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IN THE

Supreme Court of the United States

IN RE:
HERBERT S. MONCIER,

Petitioner.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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February 22, 2010 *Counsel For Petitioner*

QUESTIONS PRESENTED

1. Was Petitioner denied his structural constitutional right to an impartial judge by the Magistrate-Judge, District Judge and Sixth Circuit considering the findings of a disqualified judge to discipline Petitioner.

2. Is Petitioner protected from being disciplined for conduct Petitioner reasonably believed was required of him by his ethical and Constitutional duties as an attorney-advocate for his Client?

3. Was Petitioner denied Constitutional rights in his *quasi*-criminal disciplinary proceedings?

4. Was Petitioner denied *In re Snyder* appellate review and his Fed. R. App. P. 4 right to appeal non-frivolousness and constitutional claims?

5. Did the doctrines of primary jurisdiction, federal abstention, and choice of forum and remedies require Judge Collier permit the Tennessee Board of Professional Responsibility complete proceedings against Petitioner previously instituted against Petitioner by Judge Greer for the same conduct?

6. Was Petitioner's discipline arbitrary, unlawful, unnecessary and unreasonable?

7. Were Judge Collier and the Magistrate-Judge disqualified and/or required to respond to requests for information pertaining to their qualification?

PARTIES TO THE PROCEEDINGS

Disciplinary charges were filed against Petitioner by Eastern District of Tennessee District Judge Curtis L. Collier in his capacity as the rotating Chief Judge for the District. [Pet. Appx. 5-10]

The only party to the proceeding in the Court of Appeals for the Sixth Circuit was Petitioner, Herbert S. Moncier.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at *In re Herbert S. Moncier*, 329 Fed. Appx. 636 (6th Cir. Tenn. 2009). (Pet. Appx. 1-2)

The opinion of the same panel of the United States Court of Appeals for the Sixth Circuit, referenced in the Opinion in this appeal, is reported at *United States v. Moncier*, 571 F.3d 593 (6h Cir. 2009).

A Petitioner for Writ of Certiorari in the case during which Petitioner's conduct occurred has been filed in this Court on February 17, 2010 in *Michael Carl Vassar v. United States*, Application number 09A560.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment, United States Constitution.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment, United States Constitution.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution Section 9, Cause 3. Bill of attainder–Ex post facto laws.

> No Bill of Attainder or *ex post facto* Law shall be passed.

Eastern District Tennessee Local Rule 83.6 Rules of Professional Conduct.

> The Rules of Professional Conduct adopted by the Supreme Court of Tennessee are hereby adopted as rules of professional conduct insofar as they relate to matters within the jurisdiction of this Court.

Eastern District Tennessee Local Rule 83.7 Disbarment.[1]

> **(a) Conduct Subject to Discipline.** The Court may impose discipline on any member of its bar who has violated the Rules of Professional Conduct as adopted by the Supreme Court of Tennessee, or has engaged in unethical conduct tending to bring the Court or the bar into disrepute. The Court may also discipline any member who has been suspended or disbarred from the practice of law by the state in which he or she is a member, or by any court of record. Discipline which may be imposed includes disbarment, suspension, reprimand, or such other further disciplinary action as the Court may deem appropriate and just. Nothing in this rule shall be construed as limiting in any way the exercise by

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[1] This is the rule in effect at the time of Petitioner's disciplinary hearing in 2008. The rule was amended in 2009.

the Court of its inherent contempt power or its authority to impose other sanctions provided under federal law and the Federal Rules of Civil Procedure.

(b) Initiation of Disciplinary Proceedings. Formal disciplinary proceedings shall be initiated by the issuance of an order to show cause signed by the Chief Judge. An order to show cause may be issued by the Chief Judge on his or her own initiative or upon a complaint filed by any counsel of record or party to an action in this Court. When such order is issued on the Court's initiative, no separate complaint need be filed. All complaints relating to disciplinary matters under this rule shall be filed under seal with the Clerk. All records pertaining to attorney disciplinary proceedings, except with respect to reinstatement proceedings, shall be confidential and kept under seal in the Clerk's Office unless otherwise ordered by the Court. (1) All complaints of attorney misconduct shall include: (i) The name, address, and telephone number of the complainant; (ii) The specific facts that require discipline, including the date, place and nature of the alleged misconduct, and the names of all persons and witnesses involved; (iii) Copies of all available documents or other evidence that support the factual allegations, including a copy of any rule or order of the Court that is alleged to have been violated; and (iv) At the end of the complaint, a statement signed by the complainant under penalty of perjury that the complainant has read the complaint and the factual allegations contained therein are correct to the best of the complainant's knowledge.

(c) Initial Action on the Complaint. Upon filing, the complaint shall be sent to the Chief Judge for initial review.

(1) If the Chief Judge determines that the complaint on its face or after investigation is without merit or does not warrant action by the Court, the complaint shall be dismissed by order of the Chief Judge.

(2) If following review it is determined that reasonable grounds exist for further investigation, the Chief Judge may order such investigation or may issue an order to show cause if the complaint appears to be meritorious. A copy of the order to show cause, the complaint, and accompanying documents shall be mailed to the member who is the subject of the complaint. The member shall also receive in the same mailing a copy of this rule and a written statement that the member shall have 20 days from the date of entry of the order to show cause in which to respond.

(3) Alternatively, the Chief Judge may refer the matter to a state disciplinary board for such action as it determines is appropriate.

(d) Response. A member against whom an order to show cause is issued shall have 20 days from the date of the entry of the order in which to file a response. The response shall be filed, under seal, with the Clerk, and shall contain the following:

(1) The name, address and telephone number of the respondent.

(2) A specific admission or denial of each of the factual allegations contained in the complaint and order to show cause and, in addition, a specific statement of any facts on which respondent relies,

including all other material dates, places, persons and conduct relevant to the allegations of the order.

(3) All documents or other supporting evidence not previously filed with the complaint or order that are relevant to the charges of alleged misconduct.

(4) A specific request for a hearing or a statement specifically declining a hearing.

(5) A statement signed by the respondent under the penalty of perjury indicating that the respondent has read the response and that, to the best of respondent's knowledge, the facts alleged therein are correct.

(e) Summary Dismissal. If the response discloses that the complaint is without merit, it may be dismissed by the Chief Judge.

(f) Conformity with State Discipline. When the respondent has been disbarred or suspended from the practice of law by a state in which the member practices, and the respondent admits the action complained of, or does not respond to the order to show cause, the Chief Judge may enter a final order of the court imposing similar discipline similar discipline.

(g) Judicial Officer. Upon filing of the response, the Chief Judge may appoint a judge or other judicial officer from within the Eastern District of Tennessee to investigate the allegations of the complaint and the response. The judicial officer shall review all sealed documents related to the disciplinary charges, conduct hearings if necessary, and issue a written recommendation.

(h) Hearings on Disciplinary Charges. A disciplinary hearing shall be held only when the

member under investigation has requested such a hearing in a timely response and the judge or the judicial officer has determined that such a hearing is necessary for the proper disposition of the charges.

(1) **Hearing Procedures.** When it has been determined that a hearing is necessary, the judicial officer shall provide the member with written notice of the hearing a minimum of 20 days before its scheduled date. The notice shall contain the date and location of the hearing and a statement that the member is entitled to be represented by counsel, to present witnesses and other evidence, and to confront and cross-examine adverse witnesses.

(2) **Conduct of the Hearing.** The hearing shall be conducted by the judicial officer, who shall have the authority to resolve all disputes on matters of procedure and evidence which arise during the course of the hearing. All witnesses shall testify under penalty of perjury. Such hearings, at the discretion of the judicial officer, shall be confidential and shall be recorded. The record of the hearing shall be kept on file in the Clerk's Office, under seal.

(3) **Rights of the Complainant and the Respondent.** During the hearing, the respondent shall be entitled to be represented by counsel, to present witnesses and other evidence, and to confront and cross-examine any adverse witnesses. The judicial officer may permit the complainant to participate in the proceedings through counsel.

(4) **Burden of Proof.** The respondent's violation of the Rules of Professional Conduct or rule or orders of the Court shall be proven by clear and convincing evidence. A certified copy of a final order of disbarment or judgment of conviction for a criminal offense, entered in any state or federal court, shall be considered clear and convincing evidence.

(5) **Failure to Appear.** The failure of the respondent to appear at the hearing shall itself be grounds for discipline under Subsection (a) of this rule.

(i) Recommendation. The judicial officer shall prepare a written recommendation which shall include a proposed disposition of the disciplinary charges.

(1) **Filing of the Recommendation.** The recommendation shall be filed, under seal, in the Clerk's Office and copies distributed to the Court and the respondent.

(2) **Exceptions to the Recommendation.** The respondent shall have 10 days from the date of service of the recommendation in which to file with the Clerk a written response to the recommendation. The response shall not exceed 25 typewritten pages and shall state concisely any inaccuracies, errors or omissions which warrant a disposition other than that recommended.

(j) Final Action on the Recommendation. Within 30 days of the filing of any exceptions to

the recommendation, the Court shall enter a final order of disposition. Notice of the final order shall be sent to the respondent and the complainant.

JURISDICTION

The Court of Appeals issued its decision on July 8, 2009. (Pet. App. 1-2)

A petition to rehear was denied on September 24, 2009. (Pet. App. 3)

On December 15, 2009 Justice Stevens granted an extension of the time to file a petition for a writ of certiorari to February 21, 2010. (Pet. App. 4)

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

At a hearing on November 17, 2006 in *United States v. Michael Carl Vassar*[2] District Judge J. Ronnie Greer was questioning Petitioner's client. Petitioner was stating objections to the questions. Judge Greer denied Petitioner permission to approach the bench to argue the reasons for his objections to avoid being accused of "coaching" Vassar. Judge Greer then instructed Petitioner not to state objections to his questions while standing at the podium with Vassar. Petitioner then, in a non-sarcastic normal tone requested permission of Judge Greer "May I speak to my client?"

Petitioner was placed in jail, removed from representing Vassar and cited for contempt for making

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[2] Petitioner has a Petition for Certiorari pending in this Court in *Herbert S Moncier v. United States*, _ Application Number 09A581.

the request "May I speak to my client?" Petitioner, over his demand for a jury, was tried for criminal contempt without a jury by Judge Greer and convicted on May 30, 2007. On August 21, 2007 Judge Greer sentenced Petitioner to 1 year probation, 150 hours community service; a $5,000.00 fine; 3 hours extra CLE; and an anger management course. Petitioner was denied a stay and has served the sentence and paid the fine.

While pending sentencing, on June 14, 2007 Judge Greer filed a complaint against Petitioner with the Tennessee Board of Professional Responsibility for Petitioner's conduct on November 17, 2006. Petitioner responded. The Tennessee BOPR decided to wait for the decision of the Sixth Circuit on Petitioner's appeal of his contempt conviction prior to acting on Judge Greer's complaint.

The Sixth Circuit reversed Petitioner's conviction holding Judge Greer was disqualified and remanded for a new trial. *see United States v. Moncier*, 571 F.3d 593 (6th Cir. 2009) A Petition for Certiorari is pending in this Court from the Sixth Circuit Opinion sanctioning Petitioner being tried for conduct that could reasonably be believed to be necessary to protect Vassar's Constitutional rights and to perform Petitioner's ethical duties to Vassar; denying Petitioner a jury trial; and limiting Petitioner's defenses at his new trial based on the record created before Judge Greer when he was disqualified.

On December 19, 2007 Petitioner was hired to represent Lee Almany. *Almany* was pending trial before Judge Greer. Almany had been unable to negotiate an acceptable plea agreement. Almany was to be tried on January 21, 2008. The same prosecutor trying *Vassar*

immediately moved that Judge Greer disqualify Petitioner from representing Almany because Petitioner also represented a Gary Musick on appeal. Musick, as had Almany, declined to cooperate and chose to proceed to trial. Prior to agreeing to represent Almany at trial, Petitioner conferred with Musick and assured himself there was not a conflict. Petitioner obtained written waivers and acknowledgments from Musick and Almany.

Almany was well known in the Greeneville Division. Almany previously had one charge dismissed and was acquitted by a jury on another charge. Fearing Petitioner's prior strained relationship with Judge Greer may result in Judge Greer disqualifying Petitioner, Almany requested Petitioner to file 28 U.S.C. § 144 affidavit and § 455 motion to disqualify the Magistrate-Judge and Judge Greer. Both disqualified themselves.

District Judge Curtis L. Collier, sitting in the Southern Division of the District in Chattanooga approximately 3 hours from Greeneville, was serving a rotation as the District's Chief Judge. Judge Greer disqualified himself by order on January 3, 2008. Judge Collier, on the same day, reassigned *Almany* to himself and set a hearing in Chattanooga on the prosecutor's motion to disqualify Petitioner for January 9, 2008.[3]

Almany was questioned at length by Judge Collier on January 9, 2008. Nothing Amany said indicated a lack of understanding or any conflict with Musick by Petitioner represent him. Written waivers

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[3] Knoxville is approximately 1/2 the distance from Greeneville to Chattanooga and had two District Judges and two Senior Judges who often interchange with Judge Greer were available.

and acknowledgements of Almany and Musick were filed. There was no Fed. R. Crim. P. 44(c) joint representation. There was no conflict.

Nevertheless Judge Collier disqualified Petitioner and declined to make any findings at that time. Judge Collier ordered Petitioner to have no further contact with Almany or his family. Judge Collier then appointed a local attorney from the Chattanooga area to represent Almany. Almany ultimately accepted the plea he had previously rejected when he hired Petitioner to try his case.

Eight days later, on January 17, 2008, Judge Collier, without mentioning *Almany*, entered a show cause order for Petitioner to establish that conclusions Judge Collier's made from reading the November 17, 2006 transcript in *Vassar* were "inaccurate." Judge Collier appointed a Magistrate-Judge he hired and supervised to act as Petitioner's "judicial officer" and limited the hearing before her to a demonstration by Petitioner that Judge Collier's charges were "inaccurate."

After issuing the Show Cause Order, Judge Collier transferred Almany's case back to Judge Greer. Petitioner filed a motion to determine whether Judge Collier had Petitioner's disciplinary proceeding before him at the time Judge Collier disqualified Petitioner from representing Almany. Petitioner cited the fact that Judge Collier sent Almany's case back to Judge Greer after removing Petitioner as a circumstance that might reasonably question Judge Collier's impartiality under 28 U.S.C. § 455 because Judge Greer's disqualification in *Albany* would apply in all of Petitioner's cases in the Greeneville division if Petitioner were permitted to

practice in the EDTN. After Petitioner's motion, Judge Collier reassigned Almany back to himself stating the reassignment back to Judge Greer was a "mistake."

After a two day hearing the Magistrate-Judge issued a 61-page opinion. [Pet. App. ****] The Magistrate-Judge pretermitted all of Petitioner's defenses and evidence by applying "issue preclusion" to the findings of Judge Greer in Petitioner's criminal contempt trial. Based exclusively on the findings of Judge Greer, the Magistrate-Judge recommended Petitioner be disciplined but "reserved" the nature and amount of discipline to Judge Collier.

Petitioner filed Local Rule "exceptions." Judge Collier in an 81-page opinion affirmed the Magistrate-Judge and also applied "issue preclusion" to Judge Greer's findings from the contempt proceedings. [Pet. Appx. pp. 11-74 at 56] Judge Collier denied Petitioner's request a hearing as to the nature or amount of discipline. Judge Collier disciplined Petitioner for each defense, motion and evidence Petitioner presented in his defense.

Judge Collier on April 28, 2008 suspended Petitioner *instanter* from the bar of the Eastern District for seven (7) years with five years being active suspension. Judge Collier imposed conditions that in language reminiscent of his order in *Almany* prohibiting Petitioner from speaking to any of Petitioner's existing clients directly or indirectly; conferring with any client on a matter that could involve a federal question; speaking to attorneys about federal matters who are members of the bar of the EDTN; being in the audience section of federal courtrooms; or speaking to federal court personnel. Judge Collier denied Petitioner a stay

of the suspension holding that Petitioner was a danger to society.

Petitioner had 23 pending federal cases with contract fees in excess of one (1) million dollars that Petitioner instantly was required to abandon based on Judge Collier's order. Four of those cases were serious criminal cases in varying stages. One of the criminal cases had national attention where a janitor was charged with stealing classified materials and was going to trial before a jury to resolve disputes as to his "offense of conviction" for sentencing guideline determinations.

At the time of Petitioner's suspension over 70% of Petitioner's practice was in federal courts. Petitioner's federal criminal practice had developed toward persons who could not resolve their cases by plea agreements and wished to hire Petitioner to try their cases before a jury. The balance of Petitioner's practice in state courts involved civil or constitutional rights that almost always had federal components. Petitioner's admission *pro hac vice* in other federal Districts was based on Petitioner's good standing in the Eastern District of Tennessee. The evidence Petitioner offered established that his April 28th *instanter* suspension and the additional conditions imposed were the functional equivalent of shutting down Petitioner's law practice.

Prior to the events of November 17, 2006 before Judge Greer, Petitioner had never been held in contempt of court or had a complaint to the Tennessee Board of Professional Responsibility.

Petitioner graduated from the University of Tennessee Law School in 1970 and received a master of law degree from George Washington National Law

Center in 1974. Petitioner served as a Captain in the Judge Advocate General Corps from 1971 to 1974; as a prosecutor in the Knox County Attorney General's office from 1974 to 1976; and in private practice in federal and state courts since 1976. Petitioner tried numerous high profile local, regional and national cases throughout the eastern part of the country and had appeared before the 1st, 4th, 5th, 6th, 9th and 11th Circuit Courts of Appeal. Petitioner has been a member of he bar of this Court since 1981.

At the time of his suspension Petitioner had been rated A-V by Martindale-Hubble for over 25 years; listed in "Best Lawyers in America" since 1994; listed in "Super Lawyers" since 2001; listed in Tennessee's Best 100 Lawyers since 2002; listed in local publications as a best criminal defense attorney; and had been recognized by the Tennessee Association of Criminal Defense Lawyers and National Association of Criminal Defense Lawyers.

Petitioner had served as the president of the Young Lawyers of he Knoxville Bar Association and Tennessee Association of Criminal Defense attorneys. Petitioner was a frequent speaker at professional seminars on criminal defense topics and taught criminal law at several institutions.

REASONS FOR GRANTING THE PETITION

I. Petitioner was denied his structural constitutional right to an impartial judge by the Magistrate-Judge; Judge Collier; and the Sixth Circuit considering the findings of Judge Greer who was disqualified.

Regardless of the length, or how well written the 61-page Magistrate-Judge recommendation or Judge Collier's 81-page opinion may be, unless those writings were based on constitutional procedures and afforded Petitioner his constitutional rights those opinions are defective.

The Magistrate-Judge hearing Petitioner's case exclusively applied "issue preclusion" to the findings of Judge Greer in Petitioner's contempt case to recommend Petitioner be disciplined and thereby pretermitted all of Petitioner's defenses and evidence. [Pet. Appx. pp. 56]

Judge Collier denied Petitioner's exceptions and held Petitioner was "certainly aware of those findings" [id. 480-491]; held Judge Greer "witnessed the conduct" and was in "the best position to assess the nature, demeanor, and atmosphere involved" [id. 491]; and Judge Greer's findings should be given "substantial deference" like appellate courts give to trial courts. [id. 491] Judge Collier held that "Judge Greer's factual findings in Respondent's criminal contempt conviction are clear and convincing evidence of Judge Greer's perceptions of what occurred at the hearing." Possibly the most surprising reason Judge Collier applied issue preclusion to Judge Greer's findings was his ruling that the "only use of Judge Greer's opinion is the factual findings as to Respondent's disrespectful and unprofessional conduct."

The Sixth Circuit Opinion, after holding Judge Greer was disqualified, sanctioned the Magistrate-Judge and Judge Collier's reliance on the findings of Judge Greer. According to the Opinion, their consideration of Judge Greer's findings was "harmless error."

In *Herbert S. Moncier v. United States* Supreme Court , Application Number 09A581, Petitioner request this Court grant that Petition to determine whether Petitioner's defenses at his retrial for contempt can be limited by the Sixth Circuit based on the record created before Judge Greer who was disqualified. Petitioner adopts those arguments in this Petition.

Petitioner requests this Petition be granted to consider whether findings of Judge Greer, who was disqualified can, consistent with Petitioner's structural constitutional right to an impartial judge, be relied on exclusively by the Magistrate-Judge at Petitioner's hearing and Judge Collier to find "clear and convincing" evidence to discipline Petitioner.

II. Petitioner is protected from being disciplined for conduct he reasonably believed was necessary to provide Vassar his Constitutional right to counsel and for Petitioner to perform his ethical duties an attorney-advocate for Vassar.

In Petitioner's related Petition to this Court in *Moncier v. United States*, Petitioner requests this Court grant his Petitioner to consider whether Petitioner can be charged with criminal contempt for conduct he reasonably believed to be required by his ethical and Constitutional duties to Vassar. In this Petition, Petitioner requests this Court consider whether he can

be disciplined for conduct he reasonably believed to be required by his ethical and Constitutional duties to Vassar. Petitioner adopts the reasons for granting the Petition on this issue that are more fully developed in *Moncier v. United States.*

Petitioner asserts that Petitioner's discipline is in conflict with this Court's opinions in *Maness v. Meyers,* 419 U.S. 449, 457 (1975); *Sacher v. United States,* 343 U.S. 1, 14 (1952); *In re McConnell*, 370 U.S. 230, 239 (1962) and the Seventh Circuit standard in *In re Dellinger,* 461 F.2d 389, 400 (7th Cir. 1972) "an attorney possesses the requisite intent only if he knows or reasonably should be aware in view of all the circumstances, especially the heat of controversy, that he is exceeding the outermost limits of his proper role and hindering rather than facilitating the search for truth."

In *Sacher v. United States,* 343 U.S. 1, 14 (1952), this Court held

> But that there may be no misunderstanding, we make clear that this Court, if its aid be needed, will unhesitatingly protect counsel in fearless, vigorous and effective performance of every duty pertaining to the office of the advocate on behalf of any person whatsoever.

Petitioner requests this Court provide him the aide promised in *Sacher* by granting his Petition to consider whether he is protected from being disciplined for conduct that he reasonably believed was necessary to protect the constitutional rights of his client and perform his ethical duties an advocate.

III. Petitioner was denied Constitutional protections in his *quasi*-criminal disciplinary proceeding.

Disciplinary proceedings designed as a penalty on a lawyer are "adversary proceedings of a *quasi*-criminal nature." *In re Ruffalo*, 390 U.S. 544, 550 (1968). In *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982) this Court held "noncriminal [disciplinary proceedings] bear close relationship to proceedings criminal in nature." In *In re Gault*, 387 U.S. 1, 30 (1967) this Court held the *quasi*-criminal juvenile hearing need not comply with all of the requirements of a criminal trial but "the hearing must measure up to the essentials of due process and fair treatment." This Court in *In re Snyder*, 472 U.S. 634, 646 (1985) held an attorney is entitled to appellate review of the sufficiency of discipline.[4,5]

Judge Collier not only denied Petitioner's Constitutional claims but he also disciplined Petitioner for presenting those claims.

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[4] *Snyder* was disciplined by a Circuit Court pursuant to Fed. R. App. P. 46 that provides for a different standard of conduct in federal appellate courts from that adopted in the EDTN by Local Rule 83.6.

[5] Petitioner asserts EDTN Local Rule 83.7 defines Fifth Amendment due process disciplining attorneys in the EDTN. Many of the Constitutional protections Petitioner was denied are also contained in, or defined by Eastern District of Tennessee Local Rule 83.7, including Petitioner's right to of notice of the rules he was changed with violating; the burden of proof being on the complainant; the requirement witnesses testify under oath; the right of cross-examination; and the present evidence.

The Sixth Circuit Opinion was 1 1/2 pages; failed to review any of Petitioner's Constitution claims on appeal; thereby sanctioning the denial of those claims.

In *quasi*-criminal juvenile delinquency proceedings this Court held the Due Process Clause of the Fourteenth Amendment requires the hearing must measure up to the essentials of due process and fair treatment, as a requirement which is part of. *In re Gualt*, 381 U.S. 1, 30 (1967). This made applicable constitutional rights in *quasi-criminal* juvenile proceedings to "virtually coextensive with an adult's" and included "due process of law;" "notice, counsel, and confrontation of witnesses;" "the right against self-incrimination [and] protection against coerced confessions;" "guarantees against double jeopardy;" and "the presumption of innocence implemented by the government's burden to prove guilt beyond a reasonable doubt". see *W. v. California*, 449 U.S. 1043, 1047 (U.S. 1980)

A. Petitioner was denied Fifth Amendment protection from impermissible shifting of the burden of proof.

Judge Collier reviewed a transcript of a November 17th hearing in *United States v. Vassar* and concluded Petitioner had committed multiple acts of misconduct. Thereafter Judge Collier Ordered Petitioner's hearing "shall be limited to a demonstration by Petitioner that the allegations in the Show Cause Order are inaccurate."

Respectfully, this procedure was destined to be a self-fulfilling prophecy. Judge Collier formed opinions and then required Respondent establish his opinions

were inaccurate. As addressed *infra*, not only did this procedure impermissibly shift the burden of proof, Judge Collier prejudged Petitioner's conduct by forming and expressing opinions prior to Petitioner's hearing disqualifying both Judge Collier and the Magistrate-Judge pursuant to 28 U.S.C. § 455.

In *In re Winship*, 397 U.S. 358 (1970) this Court held the Fifth Amendment requires the burden of proof be on the Government to establish the crime beyond a reasonable doubt. This Court applied these Constitutional protections to *quasi*-criminal juvenile delinquency proceedings. *W. v. California*, 449 U.S. 1043, 1047 (U.S. 1980).

Sandstrom v. Montana, 442 U.S. 510 (1979) held the Fifth Amendment prohibits shifting the burden of proof to a defendant in a criminal proceeding. EDTN LR 83.7(h)(4) requires that prior to discipline being imposed, proof of a violation of the Code of Professional Conduct must be established by "clear and convincing evidence."

B. Petitioner was denied Fifth Amendment notice; Sixth Amendment information; and *ex post facto* protection by Judge Collier, after Petitioner's conduct and hearing, applying different, unconstitutionally vague and uncertain standards instead of the standards applicable to Petitioner pursuant to the Local Rules of the District.

Eastern District Tennessee Local Rule 83.6 provides that "The Rules of Professional Conduct adopted by the Supreme Court of Tennessee are hereby

adopted as rules of professional conduct insofar as they relate to matters within the jurisdiction of this Court." Petitioner's defense was that he did not violate the Tennessee Rules of Professional Conduct. Petitioner affirmatively asserted his conduct was required by Tennessee's RPC.

The Magistrate-Judge preempted Petition's RPC defenses by applying "issue preclusion" to the findings of Judge Greer who previously held Petitioner in criminal contempt of court. Judge Greer was held to be disqualified in *United States v. Moncier*, *supra*. Petitioner filed EDTN LR 83.7 "exceptions" from the Magistrate Judge to Judge Collier and continued to assert his conduct did not violate a provision of the Tennessee RPC but was in fact required by those rules. Judge Collier rejected Petitioner's claims that EDTN LR 83.6 provided the standard of conduct that governed Petitioner's conduct was Tennessee's RPC. Instead the District Judge held:

> [T]he federal courts have their own distinct requirements and standards for attorneys practicing before them. The federal courts also have their own requirements and standards which must be maintained for members to continue to practice in federal court. Thus, the requirements for admission and continued practice in federal and states courts are distinct. . . . . Federal courts must establish their own standards of practice to create an effective, functional judicial system which involves attorneys practicing throughout the United States and its territories."

In footnote 6, Judge Collier cited a selected phrase from the TRPC, Scope (2) "It is important to keep in mind the Tennessee Rules of Processional Conduct expressly do not 'exhaust the moral and ethical considerations that should inform a lawyer [*]'[6] they "simply provide a framework for the ethical practice of law." In an Order on 7/31/08 the Chief Judge described EDTN LR 83.6 as only "one of the standards to which attorneys admitted to the bar of this Court must meet." In footnote 7 Judge Collier noted the phrase of EDTN LR 86.7(a), i.e., "engaged in unethical conduct tending to bring the court or the bar into disrepute" is not defined in the Tennessee RPC but held

> Unethical conduct must be defined by case law; widely accepted standards of the profession such as standards adopted by the American Bar Association, the American College of Trial Lawyers, and other such organizations; or the generally recognized standards of ethical and professional behavior in this district.[7,8]

Judge Collier cited cases decided in 1812 and 1821, long before the adoption of EDTN LR 83.6 and the Tennessee RPC to hold "Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their

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[6] [*] represents a RPC, Scope 2, explanation phrase Judge Collier left out "for no worthwhile human activity can be completely defined by legal rules"

[7] Judge Collier did not cite specific provision of those standards that are different from the Tennessee RPC.

[8] Judge Collier did not include the National Association of Criminal Defense Attorneys.

presence, and submission to their lawful mandates" and these powers provide federal courts power to "regulate and discipline attorneys."

Congress provided authority for the Courts to establish various rules of practice and procedure in 28 U.S.C. § 2072. The Supreme Court adopted Fed. R. Civ. P. 83 and Fed. R. Crim. P. 57 that provide for District Court to adopt local rules of court. Fed. R. Civ. P. 83(a)(1) and Fed. R. Crim. P. 57(c) both provide "A local rule adopted under this rule takes effect on the date specified by the district court and remains in effect unless amended by the district court or abrogated by the juridical council of he circuit in which he district is located."

28 U.S.C. § 2072(b) prohibits a rule of court abridging, enlarging or modifying a substantive right. If Petitioner's conduct complied with Tennessee's RPC, or was required by those rules, Petitioner cannot be subjected to different "federal" standards of conduct first applied after Petitioner's conduct.[9] EDTN LR 83.7(a), second clause relied on by Judge Collier, requires there must be an "unethical act" for that clause to establish different and distinct federal standards in the EDTN. None of the standards referred to by Disciplinary District Judge, however, define what is an "unethical act." Tenn. Sup. Ct. R., Scope (1) provides for there to be an "unethical" act, there must be a violation of a mandatory, i.e. "shall", provision of the Tennessee RPC. Tenn. Sup. Ct. R. RPC "ethical standards" define

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[9] Judge Collier may have misconstrued this Court's consideration of Fed. R. App. P. 46 in *In re Snyder*, 472 U.S. 634 (1985). Fed. R. App. P. 46 that applies to federal appellate courts is entirely different from EDTN LR 83.6 that applied to Petitioner in the district court.

conduct that is "unethical" and subject to discipline pursuant to LR 83.7(a).

Although "Federal standards" are discussed in a number of federal cases, however, Local Rule 83.6 adopts the Tennessee RPC in the Eastern District of Tennessee and the Tennessee Sup. Ct. R. 8, RPC define the "ethical standards" for attorneys in that District. Judge Collier simply chose not to apply the Local Rules in Petitioner's discipline and denied Petitioner his defenses predicated on the Tennessee RPC.

Petitioner requests this Court grant the Petition to determine whether Petitioner's right to Fifth Amendment notice; Sixth Amendment information; and protection from being subjected to *ex post facto* law was violated by Judge Collier disregarding Tennessee's RPC made applicable to Petitioner pursuant to EDTN LR 83.6 and applying what Judge Collier said were federal standards of conduct to Petitioner's conduct.

C. Petitioner was disciplined for Fifth Amendment impermissibly vague and overly broad standards.

Regardless of the worthiness of the standards applied by Judge Collier, the breath and vagueness of those standards subjected Petitioner to Judge Collier's predilections. For example, according to Judge Collier, the federal standard for discipline requires attorneys "to demean themselves as an attorney uprightly and according to the law" [and in a] "highly professional and civil manner, demonstrating respect for the court, opposing counsel, the judicial system, and the parties involved in the judicial action."

Repeatedly, Judge Collier referred to Petitioner's actions as "unprofessional conduct." On other occasions, Judge Collier described Petitioner's conduct as being "unethical and unprofessional." "Unprofessional conduct" is not a term used either in EDTN LR 83.7 or the TRPC. It is unknown whether Judge Collier is of the opinion that "unprofessional conduct" equates to an "unethical" act that is subject to discipline under EDTN LR 83.7. Judge Collier concluded that Petitioner's conduct "has fallen below that required of members of the bar of the Eastern District of Tennessee" such that permitting Petitioner to continue as a member of the EDTN federal bar "poses an immediate danger to the public, the bar and this court." Judge Collier, held Petitioner failed to "demean [himself] as an attorney, proctor and solicitor of this Court, uprightly and according to law."

In *United States v. Wunsch*, 84 F.3d 1110, 1117-1119 (C.A.9,1999) the Court held a California Rule "It is the duty of an attorney . . [to] abstain from all offensive personality[.]" was unconstitutionally vague and overly broad citing *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

There is scant difference between the vagueness and over-breath of the California rule requiring an attorney abstain from "offensive personality" and Judge Collier's rule that Petitioner was required to "demean [himself] as an attorney, proctor and solicitor of this Court, uprightly and according to law."

Petitioner had no way to know he was subject to discipline under rules of the "American Bar Association, the American College of Trial Lawyers, and other such organizations; or the generally recognized standards of

ethical and professional behavior in this district" to discipline Petitioner." LR 83.7(b) requires that "(1) All complaints of attorney misconduct shall include . . . (ii) The . . . nature of the alleged misconduct, and . . . (iii) . . . a copy of any rule or order of the court that is alleged to have been violated. EDTN LR 1.1(c) provides the Local Rules "supersedes any judges rules." EDTN LR 83.6 adopting the Tennessee RPC. Therefore, EDTN LR 83.6 superseded the rules Judge Collier applied *ex post facto* to Petitioner.

Presumably Judge Collier used the same "standards" to make the conclusions about Petitioner's conduct stated in his Show Cause Order. Petitioner, however, only learned of these rules long after Petitioner's ability to comply with those rules and after his ability to defend his actions as comporting with those rules.

Regardless of whether Judge Collier's rules exist in some authority, and regardless of how well intended those rules may be, those standards are not found in the Tennessee RPC and those rules were neither cited in, nor attached to, the Show Cause Order as required by EDTN LR 83.7(b)(1)(iii). The non-specific standards applied permitted Judge Collier to apply his own predilections and standards to support his pre-determined decision to discipline Petitioner.

Petitioner request this Court grant the Petition to determine if Petitioner was denied Fifth Amendment notice and LR 83.7(b)(1)(iii) notice of the standards of conduct he was charged with violating.

D. Petitioner was denied his Sixth Amendment right of confrontation and

cross-examination of non-testifying judges.

The right of confrontation is applicable to *quasi-criminal* juvenile proceedings. *In re Gault*, 387 U.S. 1, 56 (1957) EDTN LR 83.7(h)(3) specifically provided Petitioner the right to "to confront and cross-examine any adverse witnesses."

Judge Greer became an adverse witness when the Magistrate-Judge applied issue preclusion to Judge Greer's findings in Petitioner's contempt proceedings and Judge Collier relied on Judge Greer's factual findings to discipline Petitioner.

Judge Collier overruled Petitioner's exceptions to considering non-testifying findings of Judge Greer and held Petitioner was "certainly aware of those findings" [id. 480-491]; Judge Greer "witnessed the conduct" and was in "the best position to assess the nature, demeanor, and atmosphere involved" [id. 491]; and Judge Greer's findings should be given "substantial deference" like appellate courts give to trial courts. [id. 491] Judge Collier held that "Judge Greer's factual findings in Respondent's criminal contempt conviction are clear and convincing evidence of Judge Greer's perceptions of what occurred at the hearing." Possibly the most surprising reason Judge Collier applied issue preclusion to Judge Greer's findings was his ruling that the "only use of Judge Greer's opinion is the factual findings as to Respondent's disrespectful and unprofessional conduct."

Judge Collier made the observation that "It is unclear what alleged deprivation Respondent believes he suffered by not having Judge Greer as a witness." Respectfully, Judge Collier overlooked, or chose not to

address, Petitioner's rights provided Petitioner by LR 83.7(H)(1) and the Fifth and Sixth Amendments

Judge Collier became an adverse witness when he Ordered the Magistrate Judge to conduct a hearing for Petitioner to demonstrate that Judge Collier's opinions and conclusions in his Show Cause Order were "inaccurate." Judge Collier ruled that he could not be cross-examined on his opinions and conclusions because his Show Cause Order "was institution of proceedings aimed at determining the appropriate conclusion and any information necessary was stated in the Show Cause Order."

Judge Collier failed to acknowledge the stated purpose of his referral to Magistrate-Judge was for Petitioner to "demonstrate" Judge Collier conclusions in his Show Cause Order were "inaccurate." Petitioner's EDTN LR 83.7(h)(1)/Sixth Amendment right to confront and cross-examine Judge Collier was the most effective method by which Petitioner could demonstrate that Judge Collier's opinions and conclusions were inaccurate.

Judge Collier's 1/17/08 Show Cause Order provided "This show cause order and its ultimate decision as to the appropriate action(s) to be taken in regards to Petitioner are based upon his conduct during the November 17, 2006 hearing, and are in no way predicated on him having been convicted of criminal contempt." Not predicating discipline on Petitioner "having been convicted of criminal contempt" but then predicating Petitioner's discipline on findings from the contempt conviction appear purely semantic.

Inexplicably, Judge Collier held Petitioner did not "offer any objection to any of Magistrate-Judge Lee's findings or recommendations on the merits of the matter" that were based on issue preclusion from Judge Greer's findings and attributed Petitioner's failure to object to her findings as a "testament to the fine work performed by the Magistrate Judge" when in truth and fact the Magistrate-Judge's findings were the findings of Judge Greer.

Judge Collier overruled Petitioner's exceptions to Magistrate-Judge Lee applying issue preclusion because Petitioner did not factually or legally develop the argument that was "factually-barren" and "surprising" and it "defies credibility" that Petitioner would expect the Magistrate-Judge to ignore Judge Greer's "clearly-detailed impressions of the events, and it would blindly accept [Petitioner] often evasive, revisionist, and self-serving account of his conduct." Again, this finding was made even though Judge Greer did not testify, and has yet to be confronted or cross-examined as provided for by the EDTN rules and the Constitution.

In *Crawford v. Washington*, 541 U.S. 36 (2004) this Court held that the right of confrontation prohibited the introduction of testimonial hearsay.

Petitioner requests this Court grant the Petition to determine if the Fifth Amendment right of confrontation applies in *quasi*-criminal attorney discipline hearings and whether findings of a non-testifying judge can be relied on in a *quasi*-criminal disciplinary proceeding.

E. Petitioner was denied his federal Constitutional right to present a complete defense.

The Magistrate-Judge denied Petitioner's request for subpoenas for documents and for witnesses because the hearing would be limited to the November 17, 2006 transcript. As discussed, *supra*, the Magistrate-Judge then applied issue preclusion to all issues.

On Petitioner's exceptions Judge Collier ruled "Respondent was permitted to submit evidence after the hearing, and filed nearly two dozen declarations from other witnesses. These witnesses possess no personal knowledge of the November 2006 hearing, as none of the witnesses are claimed to have been present, and are thus not material to that issue."

Judge Collier severely and unjustifiably criticized and denounced expert declarations of attorneys who examined the November 17th transcript and disagreed with Judge Collier's conclusions. Judge Collier described the declaration of Dr. Bethany Dumas, a lawyer and nationally known expert in linguistics, as "outlandish", "ludicrous", "incredible", "ignorance" and "devoid of belief." Judge Collier challenged the fact that she voiced her opinions "after reading" his Show Cause Order. Judge Collier then embarked on a parody of Dr. Dumas' opinions claiming the court is not "mocking" Dr. Dumas but her opinions were "utter absurdity" in light of unspecified "surrounding circumstances" the court presumed Dr. Dumas was not aware of.[10] Judge Collier then blamed Petitioner for submitting the declarations

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10 Compare Federal Code of Judicial Conduct Canon 1.

as "false or misleading" evidence and required as a condition of Petitioner being readmitted that Petitioner personally apologize to each witness for involving them in Petitioner's defense.

Judge Collier apparently overlooked, or chose not to address, that his Show Cause Order was based exclusively on his review of the November 17th transcript; that he was not present at that hearing; but that he required Petitioner establish was inaccurate. The 23 attorneys Judge Collier rejected each reviewed the exact same transcript in forming their conclusions and opinions that Judge Collier's conclusions were inaccurate.

Judge Collier essentially held that anyone who disagreed with his preconceived opinions and conclusions were wrong. It is not surprising the Magistrate-Judge he hired and supervised chose not to disagree with his opinions and conclusions.

In *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) this Court held

> Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, *Chambers v. Mississippi*, supra, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, *Washington v. Texas*, 388 U.S. 14, 23 (1967); *Davis v. Alaska*, 415 U.S. 308 (1974), the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S., at 485; cf. *Strickland v. Washington*, 466 U.S. 668, 684-685 (1984)

In *Holmes v. South Carolina*, 547 U.S. 319 (U.S. 2006) this Court held that a state evidentiary rule violated a defendant's federal constitutional right to present a complete defense.

Petitioner requests this Court grant the Petition to consider whether the constitutional right to present a complete defense applies to *quasi*-criminal attorney discipline cases and whether Judge Collier's rejection of Petitioner's evidence denied Petitioner his constitutional right to present a complete defense.

F. Petitioner was denied Fifth Amendment due process by Judge Collier "gauging" Petitioner's discipline on personal knowledge from an unknown case.

Judge Collier relied on an unnamed, uncited case to "gauge" the discipline he imposed on Petitioner. (Pet. Appx. 137) Petitioner filed a post-hearing motion for the name, citation or location of the case. Judge Collier declined to provide Petitioner the name, citation or place of the case in an opinion holding, for the first time, that the Federal Rules of Civil Procedure Petitioner cited for the post-hearing motion do not apply to LR 83.7 disciplinary proceedings.[11]

"[C]ore requirements" of Fifth Amendment due process are "adequate notice ... and a genuine

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[11] LR 1.1(d) provides: "(c) Scope of Rules; Construction. These rules supersede all previous rules promulgated by this court or any judge of this court and supplement the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure and the Civil Justice Reform Act plan for the Eastern District of Tennessee . . ."

opportunity to explain". *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315, (1950) The opportunity to be heard must be given "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552, (1965).

Respectfully, irrespective of the requirements of due process or a meaningful opportunity to be heard, providing the name and citation of a case relied upon in determining an issue is basic 101 legal procedure.

What Judge Collier did is similar to the actions of a district judge in *United States v. Hayes*, 171 F.3d 389, 392 (6th Cir.,1999) by expressly relying on a previously undisclosed victim impact letter to sentence a defendant. The Court held the judge's conduct affected the defendant's "substantial rights" and reversed for plain error. In *United States v. Hamad*, 495 F.3d 241, 251 (6th Cir.,2007) the Court held "escalation of a sentence based on undisclosed evidence raises serious due process concerns."

Once again, in spite of their own cases, the Sixth Circuit Opinion declined to consider Petitioner's claim and sanctioned Judge Collier relying on his personal knowledge of undisclosed information to imposing harsh discipline on Petitioner.

Petitioner requests this Court grant the Petition to consider whether consistent with Fifth Amendment due process, Petitioner's discipline can be "gauged" by the personal knowledge of a judge from an unnamed, unknown case.

G. Petitioner was denied a hearing on the type or nature of discipline.

Petitioner requested and was denied a hearing before either the Magistrate-Judge or Judge Collier as to the type and amount of any discipline.

Tennessee Supreme Court Rule 9, § 8.4 requires that the applicable provisions of the American Bar Association *Standards for Imposing Lawyer Sanctions* be considered in disciplining an attorney for violation of the Tennessee RPC EDTN LR 83.6 made applicable to Petitioner.

EDTN LR 86.7(h)(2) provides "The hearing shall be conducted by the judicial officer, who shall have the authority to resolve all disputes on matters of procedure and evidence which arise during the course of the hearing." EDTN LR 83.7(i)(1) provides "The judicial officer [conducting the hearing] shall prepare a written recommendation which shall include a proposed disposition of the disciplinary charges." EDTN LR 83.7(i)(2) provides Petitioner 20 days to file "exceptions" to the recommendation. EDTN LR 83.7(j) provides "(j) Final Action on the Recommendation. Within thirty days of the filing of any exceptions to the recommendation, the court shall enter a final order of disposition. Notice of the final orders shall be sent to the respondent and the complainant." EDTN LR 1.1(c) provided EDTN LR 83.7(i)(2) "be construed so as to [be consistent with the Fed. R. Crim. P.] and to promote the just, efficient, and economical determination of every action and proceeding." Fed.R.Crim.P. 32 entitled Petitioner to a hearing as to punishment. Fed.R.Crim.P. 42(b) prohibits summary punishment without a hearing.

The Magistrate-Judge denied subpoenas or depositions of judges from other cases Petitioner had tried since November 17th, 2006 including Judge Greer, wherein Petitioner's alleged conduct did not reoccur. The Magistrate-Judge also denied Vassar being called to testify that he was attempting to get Petitioner's attention to speak to Petitioner as he was being questioned by Judge Greer. The Magistrate-Judge held these witnesses were "not relevant" to Petitioner's conduct in the November 17th transcript. These witnesses, however, were highly relevant to what, if any discipline, Petitioner should receive.

Judge Collier, without stating any authority, construed EDTN LR 83.7(i) "disposition of the disciplinary charges" to mean only whether his charges were "inaccurate" and did not to include a hearing on the type or appropriate discipline. *Cf.* Tenn. Sup. Ct. Rule 9, § 8.4.

Judge Collier's construction of EDTN LR 83.7(i) to deny Petitioner a hearing as to the type or amount of discipline is not "just" construction of the rule under an EDTN LR 1.1(c); is inconsistent with Fed.R.Crim.P. 32 and 42; and fails to meet the *Gualt* test that the hearing "measure up to the essentials of due process and fair treatment.

Petitioner request this Court grant the petition to consider whether Petitioner was entitled to a hearing as to the type and appropriate discipline and to further consider an important question as to whether federal judges are required to consider the American Bar Association's *Standards of Imposing Lawyer Sanctions* in imposing attorney discipline.

H. Petitioner was denied Fifth Amendment due process and a meaningful opportunity to be heard prior to being disciplined for presenting the foregoing Constitutional claims during his disciplinary hearing.

Beginning at page 38 and continuing through page 61 Judge Collier found each motion filed by Petitioner, and each declaration of witnesses filed by Petitioner in his defense, were filed "in bad faith and [are] frivolous" and were "not filed for any proper purpose or supported by any legal basis, but rather [were] filed for the purpose of causing unnecessary delay and prolonging these proceedings." [Pet. Appx. 143]

Then Judge Collier, at Pet. Appx. 163-167 disciplined Petitioner for 19 separate acts occurring during Petitioner's defense. Petitioner was disciplined for filing a "number of frivolous motions and other submissions that were devoid of legal or factual support and that were submitted for improper reasons" and cited particularly the filing of Dumas' declaration that "contradicts undisputed facts in this case."

EDTN LR 83.7 is clear as to the rights and procedures required to impose discipline on Petitioner. Petitioner was disciplined for his conduct and filings in an attempt to defend himself for which he had no notice as required by LR 83.7(b)(1); there was no opportunity for Petitioner to respond as required LR 83.7(c); and Petitioner has had no hearing concerning such filings or their content.

Petitioner request this Court grant the Petitioner to determine if it violates Fifth Amendment due process

notice and meaningful opportunity to be heard to discipline Petitioner for presenting defenses in his *quasi*-criminal disciplinary hearing.

I. Petitioner was denied Fifth Amendment protection from double jeopardy by being disciplined for the same conduct he had previously been punished for by criminal contempt.

Petitioner pled Fifth Amendment double jeopardy protection from his subsequent discipline for the same conduct he had been punished for by criminal contempt.

The Magistrate-Judge held disciplinary proceeding did not punish Petitioner "criminally." Judge Collier adopted the Magistrate-Judge's rulings and described Petitioner's position "exasperating." According to Judge Collier, if Petitioner's position were correct, a court could not impose discipline on an attorney convicted of "fraud, murder, treason, or any other criminal offense."

The Sixth Circuit Opinion failed to address Petitioner's claim and thereby sanctioned imposition of double punishment.

Subsequent discipline cannot categorically be allowed as Judge Collier believed. "Fraud, murder, treason, or any other criminal offenses" are different from criminal contempt and discipline for the same conduct before the same court. Each case, or crime, must be examined under this Court's "remedial or punitive" test in *United States v. Ursery*, 518 U.S. 267, 273 (1996) ; the "Functional Equivalent" Test in *Department of Revenue of Mont. v. Kurth Ranch*, 511

U.S. 767, 781-784 (1996) ; and the "Statutory Construction" and "comparative punishment test" in *Hudson v. United States.*, 522 U.S. 93, 99 (1997).

Judge Greer had authority to consider the factors listed in 18 U.S.C. § 3553(a) in sentencing Petitioner. One of the § 3553(a) factors was to "protect the public from further crimes of" Petitioner. "Protect[ing] the public from further crimes of" Petitioner was a specific reason the disciplining District Judge in his May 6, 2008 Order denied Petitioner a stay of his discipline. Judge Greer had authority pursuant to 18 U.S.C. § 3553(a) in sentencing Petitioner to provide Petitioner "needed...correctional treatment in the most effective way." 18 U.S.C. § 3563(b) provided Judge Greer had authority to impose conditions of probation that included the same discipline imposed by Judge Collier including §3563(b)(5) suspending Petitioner from the practicing law in the Courts of the Eastern District of Tennessee or anywhere else; §3563(b)(6) that Petitioner not associating with other attorneys who practice in the federal courts; or §3563(b)(23) requiring Petitioner "satisfy such other conditions" as Judge Greer may impose.

Petitioner request this Court grant the Petitioner to consider whether the Fifth Amendment prohibition of double jeopardy bars attorney discipline proceedings for the same conduct that is charged as criminal contempt.

IV. Petitioner was denied *In re Snyder* and Fed. R. App. P. 4 right of appellate review of his discipline.

The Sixth Circuit Opinion was 1 1/2 pages long. Sixth Circuit Rule 36 provides authority for summary

disposition where "each judge of the panel believes that no jurisprudential purpose would be served by a written opinion."

This Court has not previously addressed the authority of a Circuit Court to decline to address a non-frivolous claim on appeal. Fed. R. App. P. 4 provides Petitioner a right to appeal from errors committed by the district court. The Sixth Circuit's denial of review of Petitioner's non-frivolous claims makes hollow Petitioner's Fed. R. App. P. 4 right to appeal. This Court in *In re Snyder*, 472 U.S. 634, 644 fn 4 (1885 held that an attorney is entitled to review of his discipline under Local Rules by an appellate court.

Petitioner requests this Court grant the Petition to consider the important federal question as to whether the Sixth Circuit was required to address Petitioner's non-frivolous claims or acknowledge each claim and make a specific holding that each claim was frivolous or that no jurisprudential purpose would be served by addressing that claim.

V. The doctrines of primary jurisdiction, abstention and choice of law and forum required Judge Collier to permit the Tennessee Board of Professional Responsibility complete its disciplinary proceedings on a prior complaint made by Judge Greer against Petitioner with the TBOPR.

Petitioner asserted Judge Collier's impartiality might reasonably be questioned pursuant to 28 U.S.C. § 455 where Judge Greer had to disqualify himself on January 3, 2008 in *United States v. Almany* and Judge Collier, the same day, reassigned *Almany* to himself;

then disqualified Petitioner from representing Almany on January 9th; eight (8) days later on January 17th brought disciplinary charges against Petitioner for conduct occurring 14 months earlier; then reassigned Almany back to Judge Greer; and then prohibited Petitioner from taking new federal cases that could result in Judge Greer being required to disqualify himself in the future. A person might reasonably question Judge Collier's actions being to get rid of Petitioner instead of Petitioner being allowed to continue to practice and Judge Greer would be required to disqualify himself. A person might also reasonably question Judge Collier's refusal to allow the Tennessee BOPR complete its action on Judge Greer's prior complaint to be an effort by Judge Collier to preempt the Tennessee BOPR to force that agency to take action against Petitioner. Finally, a person might also reasonable question whether Judge Collier's fast-tract to remove Petitioner from practice in the federal courts was undertaken because Judge Collier knew Judge Greer was disqualified and Petitioner's conviction for contempt would be reversed.

The doctrine of primary jurisdiction applies to "cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency that administers the scheme." *see United States. v. Philadelphia Nat'l Bank*, 374 U.S. 321, 353 (1963). EDTN LR 83.6 adopted the Tennessee RPC and therefore made the Tennessee RPC primary.

Younger v. Harris, 401 U.S. 37 (1971) provided a federal court could not intervene in a state criminal prosecution prior to the completion of the state action. *Huffman v. Pursue, Ltd.*, 420 U.S. 582 (1975) expanded

the federal abstention doctrine to a state civil proceeding.

Federal abstention, or comity, has been applied to prevent federal courts from acting on matters before disciplinary proceedings before state disciplinary boards. *Middesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423, 439-432 (1982).

Burford v. Sun Oil Co., 319 U.S. 315 (1943) provides abstention is appropriate when there is an important local interest and a state-organized structure for resolving disputes relating to that interest. *see also Railroad Commission of Tex. v. Pullman Co.*, 312 U.S. 496, (1944); *Alabama Pub. Servo Comm'" v. Southern Ry. Co.*, 341 U.S. 341, 347-48 (1951); *Colorado River Water Conservation Dist v. United States*, 424 U.S. 800, 817-18 (1976)

Judge Collier denied Petitioner's motion to abstain holding "this court has not delegated and would never delegate its authority to determine for itself the fitness of attorneys practicing in the EDTN." and whether Petitioner's conduct brought the federal court into disrepute are "concerns of the utmost importance to *this* Court." Judge Collier then disciplined Petitioner for filing the motion.

Judge Greer filing the complaint with the Tennessee BOPR chose the federal remedy to discipline Petitioner to be under EDTN LR 83.7(a) and to be with the TBOPR. EDTN LR 83.6/TRPC 8.5(b)(1), regarding choice of law, provides that where the federal EDTN adopts the Tennessee RPC, the TRPC control.

Petitioner requests this Court grant the Petition to consider whether the doctrines of primary jurisdiction, abstention or choice of forum required Judge Collier to wait until after the Tennessee BOPR considered Judge Greer's prior complaint.

VI. The discipline imposed on petitioner was arbitrary, unlawful, unwarranted or unreasonable.

Tennessee Supreme Court Rule 9, § 19.2 provides a disbarred attorney can reapply for admission after a five-year suspension from the practice of law. Judge Collier, in effect, imposed the maximum allowable discipline on Petitioner under the Tennessee RPC made applicable to Petitioner by EDTN LR 83.6/TRPC. By its timing the discipline imposed was consecutive to contempt punishment of a $5,000.00 fine; 150 hours community service, one year probation, an anger management course, and extra CLE courses.

The discipline imposed bears no relationship to discipline to be considered or imposed pursuant to EDTN LR 83.6/TRPC 9, § 8.4 or the *ABA Standards for Imposing Lawyer Sanctions.*

Petitioner's hourly rate is $350.00 hour. Judge Greer's 150-hour community service at that rate had already constituted a loss to Petitioner of approximately $52,000. Petitioner had over $1,000,000 in potential fees contracted for in existing federal cases Petitioner lost as a result of the discipline and denial of a stay pending appeal.

70% of Petitioner's practice was federal and was immediately lost to him by Judge Collier's Order.

Petitioner practiced *pro hoc vice* in other federal courts based on his good standing in the Eastern District of Tennessee. Petitioner's 37 year nationally recognized law practice was destroyed by the discipline imposed.

Judge Collier continued to enter orders further restricting Petitioner's rights as a licensed attorney in Tennessee pursuant to T.C.A. § 23-3-101 after Petitioner's notice of appeal. Petitioner was required by the Sixth Circuit to file a separate appeal from those orders which Petitioner did in *In re Moncier*, Sixth Circuit 09-5227.

Petitioner waived oral argument in that appeal so that the Sixth Circuit Panel considering Petitioner's appeals of his contempt conviction and his discipline could also consider the jurisdiction of the federal disciplining Judge to place restrictions on Petitioner's rights under his Tennessee license. To date the Sixth Circuit panel has declined to rule on Petitioner's appeal *In re Moncier*, Sixth Circuit 09-5227.

Little can be accomplished by attempting to compare Petitioner's discipline to other cases. Petitioner has found no other case in American jurisprudence where an attorney has been disciplined for attempting to resolve a potential of a conflict or requesting to confer and advise his client.

In *Theard v. United States*, 354 U.S. 276, 282-283 (1957) this Court recognized that disciplinary proceedings are "vary serious business." The Court applied "the principles of right and justice" to reverse a state disciplinary proceeding. In *In re Snyder*, 105 S.Ct. 2874, 2881 (1985) held an attorney's discipline is to be reviewed for sufficiency of the evidence.

TRPC 9, §8.4 provide that the *ABA Standards for Imposing Lawyer Sanctions* apply[12]; a continuum of sanctions is to be considered; discipline be imposed with a view to obtaining uniformity; obtaining appropriate punishment should be imposed under the circumstances of each case; and provides for review by a court for "excessiveness."

Petitioner requests this Court grant the Petition to consider whether the American Bar Association *Standards for Imposing Lawyer Sanctions* is to be followed by federal judges in imposing discipline and whether Petitioner's discipline was arbitrary, unlawful, unreasonable and unnecessary.

VII. The Magistrate-Judge and Judge Collier were disqualified and/or had a constitutional duty to disclose information requested pertaining to their qualification.

Structural Constitutional Right To An Impartial Judge

Trial by a partial judge is a constitutional "structural defect" in a criminal proceeding:

> We have recognized that "some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error." [citation omitted] The right to an impartial adjudicator, be it judge or jury, is such a right. [citation omitted].

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[12] www.abanet.org/cpr/regulation/standards_sanctions.pdf

Gray v. Mississippi, 481 U.S. 648, 668, (1987); *see also Caperton v. A. T. Massey Coal Co.*, 129 S. Ct. 2252 (U.S. 2009)

A. A reasonable question existed as to Judge Collier's impartiality.

In Issue V., *supra*, Petitioner recited the circumstances surrounding Judge Collier's removing Petitioner from federal practice after Judge Greer disqualified himself in *United States v. Almany* on January 3, 2008 that reasonably question Judge Collier's impartiality and thereby required his disqualification under 28 U.S.C. § 455(a).

B. Ex Parte And/Or Personal Information.

Judge Collier relied on the following known *ex parte* and/or personal knowledge in violation of "COCFUSJ" Canon 3(A)(4) and 28 U.S.C. §455(b)(1).

1. Personal knowledge of an uncited, unnamed case he participated in to "guage" Petitioner's discipline.

2. Information from an unnamed source in the Eastern District of Kentucky concerning alleged misconduct by Petitioner.

3. "[J]udges of the eastern district of Tennessee had decided not to follow *In re Mitchell*" in Petitioner's case.

These statements established Judge Collier relied on improper *ex parte* communications and/or personal knowledge in Petitioner's case and disqualified Judge Collier pursuant to 28 U.S.C. §455(b)(1).

C. The Magistrate-Judge Was Disqualified Because Of Her Employment Relationship To Judge Collier.

Petitioner filed motions to disqualify the Magistrate-Judge to serve as a judicial officer to determine whether the disciplinary Judge's Show Cause Order opinions and conclusions were "inaccurate".

Judge Collier held he was not the "complainant" and that resolved any problem that may otherwise exist because of his employment supervision relationship with the Magistrate-Judge. Judge Collier then held that Petitioner's 28 U.S.C. § 144 and 455(a) motion "mischaracterized the local rules and the proceedings"; was "recklessly uninformed"; was "purposefully disrespectful to the court and the proceedings"; and was "without legal basis or factual foundation, and not filed for any proper purpose" and disciplined Petitioner for filing the motion. Petitioner asserts the employment supervision relationship created an appearance of bias so as to warrant disqualification. *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11 (1954).

D. Failure to Make Disclosures

Petitioner filed motions to disclose communications and personal knowledge received about Petitioner. Judge Collier chastised, and later disciplined, Petitioner for filing the motions.

According to Judge Collier, Petitioner's motion for information for a 28 U.S.C. § 144 affidavit or § 455 motion to disqualify is "bizarre and largely incomprehensible" because there is no authority to seek "discovery" from a judicial officer. Judge Collier termed

Petitioner's request another "indication of the disrespect Respondent harbors for the institutional role of judge." Judge Collier cited Petitioner's examples of potential *ex parte* communications as "accusing district judges of talking about [Petitioner]" and "vague, unfounded attacks on the judiciary." Judge Collier, however, then held that if those communications occurred that were "entirely proper." Regarding Petitioner's requests to Magistrate-Judge for disclosures of *ex parte* communications to her, including those from Judge Collier, Judge Collier said there was no "legal" authority for why such an "extraordinary request would be seriously considered;" termed the request as seeking "discovery from the presiding judicial officer;" and held requested disclosures "would detract from and make impossible" for the judge to perform their institutional role."

Petitioner was a party and had a legal interest in making certain that the judges who were trying him were both impartial and did not have undisclosed extrajudicial information about him or the matter before them. Neither Judge Collier nor the Magistrate-Judge denied *ex parte* communications regarding Petitioner.

The Canon 3(A)(4) provides judges must provide interested persons the full right to be heard and prohibit *ex parte* communications except under limited circumstances. Canon 3(A)(4).; § 455(b)(1)

Petitioner request the Petition be granted to consider these issues.

CONCLUSION

For the reasons stated, the Petition should be granted.

Respectfully submitted,

HERBERT S. MONCIER
Counsel Of Record
550 W. Main Street, Suite 775
Knoxville, Tennessee 37902
(865) 546-7746

February 22, 2010 *Counsel for Petitioner*

No. 08-5645

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

)
)
In Re: HERBERT S. MONCIER)
)
)
)
)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

Before: DAUGHTREY, ROGERS, and KETHLEDGE, Circuit Judges

PER CURIAM. Attorney Herbert Moncier appeals his seven-year suspension from the bar of the Eastern District of Tennessee for conduct described, in some detail, in another opinion released today. *See United States v. Moncier*, No. 07-6053 (6th Cir. July 8, 2009). We have considered Mr. Moncier's arguments in favor of reversal, and reviewed the substantial record in this case. And having done so, we have little to add to the District Court's exhaustive, painstaking, and well-reasoned opinion in this case. Mr. Moncier's conduct, in short, was precisely as Chief Judge Collier described it to be.

We write further to address only one of Moncier's arguments on appeal: Namely, that in disciplining Mr. Moncier, Chief Judge Collier improperly relied upon

Judge Greer's factual and legal findings in Mr. Moncier's criminal-contempt case. It is true, that in the course of his 80-page opinion suspending Mr. Moncier from practice, Chief Judge Collier cited Judge Greer's factual findings in the contempt case. But any error with respect to those citations was harmless. Mr. Moncier admitted to the conduct that was the basis of his suspension. He admitted, for example, that he interrupted Judge Greer, that he threatened to abandon his client - a criminal defendant - and that he disobeyed a direct order of the court. *See* April 29, 2008 Memorandum & Order at 58, 59-60, 63. Chief Judge Collier also noted that his findings were based on his own review of the transcript of the hearing in which the misconduct occurred. *See id.* at 55, 58, 59-60, 63. Moreover, Chief Judge Collier specifically did *not* rely on Judge Greer's legal finding of contempt. *See id.* at 24. Hence this argument, like Mr. Moncier's other ones, does not entitle him to relief.

The District Court's April 29, 2008 Memorandum and Opinion is affirmed

No. 08-5645

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: HERBERT S. MONCIER	)	
	)	
Petitioner-Appellant.	)	
	)	ORDER
	)	
	)	

FILED
September 24, 2009
LEONARD GREEN, CLERK

BEFORE: DAUGHTREY, ROGERS, and KETHLEDGE, Circuit Judges.

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green
Clerk

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court

December 15, 2009

Mr. Herbert S. Moncier
775 Bank of America Building
550 Main Avenue
Knoxville, TN 37902

Re: Herbert S. Moncier
v. United States
Application No. 09A583

Dear Mr. Moncier:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on December 15, 2009 extended the time to and including February 21, 2010.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk

by
Ruth Jones
Case Analyst

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at CHATTANOOGA

UNDER SEAL

In re:	)
HERBERT S. MONCIER	) 1:08-mc-9
BPR NO. 1910	) Chief Judge Curtis L. Collier
	)
	)

SHOW CAUSE ORDER

Pursuant to Local Rule 83.7(b) of this Court, you are formally notified that the undersigned is initiating formal disciplinary proceedings against you. It has come to the attention of the undersigned that you may have engaged in professional misconduct of a nature that may have violated the Rules of Professional Conduct as adopted by the Supreme Court of Tennessee and you may have engaged in unethical conduct tending to bring the court to the bar into disrepute.

I. FACTUAL ALLEGATIONS

The facts given rise to this notice are as follows:

As counsel in a proceeding before United States District Judge J. Ronnie Greer, Herbert S. Moncier ("Respondent") conducted himself in a manner constituting a violation of an order of the court, abuse of the court, disrespect for the court, contemptuous behavior directed at the court, interference and needless prolongation of the proceeding before the court, and obstructive behavior. Such conduct by a member of the bar of this court raises questions about Respondent's

fitness to practice before this court and remain a member of the bar of this Court. Specifically:

On November 17, 2006, Herbert S. Moncier ("Respondent") represented Michael Vassar at his sentencing hearing before Judge J. Ronnie Greer (Case No. 2:05-CR-75-3, Court File No. 683). Throughout the hearing, Respondent conducted himself in an unprofessional manner. Respondent repeatedly interrupted or spoke over the presiding judge (*see e.g.*, Case No. 2:05-CR-75-3, Court File No. 683, pp. 9, 29, 46, 53, 65, 70, 71, 95, 98). Respondent also accused the prosecution of engaging in a conspiracy to prevent him from trying cases due to his success in past trials (*see id.*, pp. 39-40, 49-50, 87-88, 91, 96).

At one point during the hearing, Respondent threatened to "sit there and remain moot," i.e. not provide a defense for his client, due to a potential conflict Respondent perceived in his representation of Mr. Vassar (*id.*,, pp. 41-42). Respondent represented to the court Mr. Vassar could not speak candidly or fully with him because of his representation of an uncharged co-conspirator (*id*, p, 43). Despite these representations of a conflict, later in the hearing, Respondent represented to the court he had "absolutely" no reason to believe he had a conflict of interest in representing Mr. Vassar (*id.*, p. 88).

The court, spanning over three pages in the record, explained, admonished, and instructed Respondent as to the appropriateness of his conduct and demeanor (*id.*, pp. 90-93). Respondent responded by contradicting the court's admonishment (*id.*, pp. 94-96).

Ultimately, the court, in exploring the conflict issue, spoke directly to Mr. Vassar, who expressed concern as to a potential conflict (*id.*, pp. 101-102). After

Mr. Vassar expressed this concern, Respondent interrupted (*id.*, pp. 103-105). The court listened to Respondent's concern; then proceeded to question Mr. Vassar (*id.*, pp. 106). Respondent again interrupted the court and, despite being told to stop interrupting, continued to do so, as follows:

THE COURT: OKAY. IT'S A VERY SIMPLE QUESTION THEN, UNDERSTANDING HOW THOSE CONFLICTS CAN ARISE, DO YOU WANT MR. MONCIER TO CONTINUE REPRESENTING YOU IN THIS CASE OR DO YOU WANT ME TO SEE IF I CAN FIND SOMEBODY WHO HAS NO CONNECTION WITH ANY OTHER CODFENDANT OR POTENTIAL CODEFENDANT IN THIS CASE?

MR. MONCIER: ONCE AGAIN, YOUR HONOR-

THE COURT: MR. MONCIER-

MR. MONCIER: HE MAKES-

THE COURT. MR. MONCIER, YOU BE QUIET.

MR. MONCIER: MAY I APPROACH THE BENCH?

THE COURT: YOU MAY STAND THERE AND DO WHAT I DOLD YOU TO DO UNTIL MR. VASSAR ANSWERS THIS QUESTION.

MR. MONCIER: FOR THE RECORD, YOUR HONOR, I OBJECT WITHOUT HIM HAVING -

THE COURT: MR. MONCIER, ONE MORE WORD AND YOU'RE GOING TO JAIL.

MR. MONCIER: MAY I SPEAK TO MY-

THE COURT: OFFICERS, TAKE HIM INTO CUSTODY.

WE'LL BE IN RECESS.

id. at pp. 106-107[1]

II. UNPROFESSIONAL AND UNETHICAL BEHAVIOR

Local Rule of the United States Court of the Eastern District of Tennessee ("E.D. TN. LR") 83.7(a) provides: "The court may impose discipline on any member of its bar who violated the Rules of Professional Conduct as adopted by the Supreme Court of Tennessee [and] has engaged in unethical conduct tending to bring the court or the bar into disrepute." It would appear Respondent's actions constitute a violation of an order of the court, abuse of the court, disrespect for the court, contemptuous behavior directed at the court, interference and needless prolongation of the proceeding before the court, and obstructive behavior. On the basis of the preceding facts, Respondent appears to be in violation of E.D.TN. LR 83.7.

III. SHOW CAUSE

Mr. Moncier is hereby **ORDERED** to **SHOW CAUSE** within twenty (20) days of the entry of this

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[1] Based upon his conduct during the hearing, Respondent was charged with and convicted of criminal contempt, both for misbehavior intended to obstruct justice, pursuant to 18 U.S. § 401(1), and disobedience to a direct order of the court, pursuant to 18 U.S.C. § 401(3). *United States v. Moncier*, 2007 WL 1577718 (E.D. Tenn. May 30, 2007). This show cause order and its ultimate decision as to the appropriate action(s) to be taken in regards to Respondent are based upon his conduct during the November 17, 2006 hearing, and are in now way predicated on him having been convicted of criminal contempt.

Order why disciplinary action should not be taken against him. Any response by Mr. Moncier shall be filed, under seal, with the clerk of court[2], and shall contain the following, in accordance with E.D.TN. LR. 83.7 (d):

(1) The name, address and telephone number of the respondent;

(2) A specific admission or denial of each of the factual allegations contained in the order to show cause and, in addition, a specific statement of any facts on which respondent relies, including all other material dates, places, persons and conduct relevant to the allegations of the order, specifically;

(a) that Respondent engaged in a pattern of disruptive behavior during the sentencing hearing on November 17, 2006; and

(b) that Respondent disobeyed the direct order of the court during the sentencing hearing on November 17, 2006; and

(c) that Respondent acted in an unprofessional and unethical manner;

(3) All documents or other supporting evidence relevant to the charges of alleged misconduct;

(4) A specific request for a hearing or a statement specifically declining a hearing;

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[2] Any response and/or inquiry should be directed to Geneva Ashby, Division Manager, 309 Joel W. Solomon Federal Building and United States Courthouse, 900 Georgia Avenue, Chattanooga, TN 37402, (423) 752-5285.

(5) A statement signed by the respondent under the penalty of perjury indicating that the respondent has read the response and that, to the best of respondent's knowledge, the facts alleged therein are correct.

The Clerk is **DIRECTED** to send a copy of this Order by certified mail to the last known address of Mr. Moncier, and to enclose a copy of E.D.TN. LR 83.7.

All records pertaining to this matter shall be confidential and kept **UNDER SEAL** in the Clerk's Office, unless otherwise ordered by the Court.

Further Respondent is **ORDERED** to inform any and all judicial officers of this district before whom he may have pending cases that formal disciplinary action pursuant to the local rules of the court have been initiated. The reason for such notice is so that the judicial officers may take appropriate action with respect to the schedules or scheduling of their cases involving Respondent. Such notice to the judicial officers shall be in confidence.

SO ORDERED

ENTER:

/s Curtis L. Collier
CHIEF UNITED STATES DISTRICT JUDGE

In Re: HERBERT S. MONCIER

1:08-mc-09

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

2008 U.S. Dist. LEXIS 78458

April 7, 2008, Filed

SUBSEQUENT HISTORY: Accepted by, Adopted by, Judgment entered by In re Moncier, 550 F. Supp. 2d 768, 2008 U.S. Dist. LEXIS 53546 (E.D. Tenn., 2008)

PRIOR HISTORY: United States v. Moncier, 2007 U.S. Dist. LEXIS 39206 (E.D. Tenn., May 30, 2007)

COUNSEL: [*1] For Herbert Moncier, Respondent: Ralph E Harwell, LEAD ATTORNEY, Ralph E. Harwell, P.C., Knoxville, TN.

JUDGES: SUSAN K. LEE, UNITED STATES MAGISTRATE JUDGE.

OPINION BY: SUSAN K. LEE

OPINION

RECOMMENDATION PURSUANT TO LOCAL RULE 83.7

I. Introduction

This disciplinary proceeding involves the alleged professional misconduct of Herbert S. Moncier ("Respondent"), an attorney admitted to the bar of United States District Court for the Eastern District of Tennessee. This matter has been referred for a recommendation concerning the allegations of, and response to, the January 17, 2008 Order to Show Cause (the "Show Cause Order") issued to Respondent by the Honorable Curtis L. Collier, Chief Judge for the Eastern District of Tennessee, under E.D. TN. LR 83.7 ("Local Rule 83.7"). For the reasons set forth herein, I **RECOMMEND** the court impose appropriate discipline on Respondent for his conduct during the November 17, 2006, hearing.

II. Procedural History

The Show Cause Order was issued to Respondent on January 17, 2008 [Doc. 1]. On February 4, 2008, Respondent filed a motion for extension [Doc. 2]; a motion for relief from the notification provision of the Show Cause Order [Doc. 3]; a motion for disclosures [Doc. 4]; and a motion [*2] to dismiss or stay the Show Cause Order [Doc. 5]. The court issued an order denying each of these motions on February 11, 2008 [Doc. 6]. On the same day, the order referring this matter for a report and recommendation pursuant to E.D. TN. LR 83.7 was issued [Doc. 7].[3]

On February 13, 2008, an order and notice of hearing was issued [Doc. 8]. The order required Respondent to appropriately respond to the Show Cause Order with a response--instead of motions--containing all of the information listed in E.D. TN. LR 83.7(d)(1) - (5), because he had thus far failed to do so. In addition, the notice set a hearing on March 5, 2008, unless a

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[3] Contrary to Respondent's assertions [*e.g.*, Doc. 34], this matter was *not* referred pursuant to 28 U.S.C. § 636 and Fed. R. Civ. P. 72 and the court never indicated such was the case. This matter was referred pursuant to Local Rule 83.7(g), which provides "the Chief Judge may appoint a judge or other judicial officer from within the Eastern District of Tennessee to investigate the allegations of the complaint and the response. The judicial officer shall review all sealed documents related to the disciplinary charges, conduct hearings if necessary, and issue a written recommendation." Local Rule 83.7(i) & (j) establishes the procedures for Respondent to assert any exceptions to the recommendation before a final order of disposition is entered.

hearing was deemed unnecessary upon receipt of an appropriate response by Respondent. On February 21, 2008, Respondent filed a motion for a hearing and requested authority to issue subpoenas to, or depose, some eight state court judges, two federal court judges, and disciplinary counsel for the Board of Professional Responsibility of the Supreme Court of Tennessee ("BPR"), and also filed motions for writs of *habeas corpus ad testificandum* for two federal prisoners, James Thornton ("Thornton") and Michael Vassar ("Vassar") [Doc. 9, 10 & 11]. These motions were denied the next day, February 22, 2008 [Doc. 12].

On February 25, 2008, Respondent filed a response to the Show Cause Order [Doc. 13]; a motion for a pretrial conference pursuant to Fed. R. Civ. P. 16 [Doc. 15]; a motion and demand for a jury trial [Doc. 16]; an objection and motion to revise the February 11 and 13 orders limiting the scope of the hearing [Doc. 17]; a motion that the court abstain from holding a hearing and/or ruling on the Show Cause Order until after the resolution of the appeal of his criminal conviction [Doc. 18]; an objection and motion to disqualify any court officer subordinate to the Chief Judge from conducting the hearing and/or making a report and recommendation concerning the same [Doc. 21]; and an "alternative response" to the Show Cause Order [Doc. 22]. On February 27, 2008, all of Respondent's February 25 motions were denied [Doc. 23].

On March 3, 2008, Respondent filed a motion to dismiss the Show Cause Order on the ground it did not comply with Local Rule 83.7(b), or in the alternative, a motion *in limine* to exclude evidence from the March 5 hearing [Doc. 24]; another motion to reconsider and for additional findings [Doc. 25]; a motion for a public hearing and public record [Doc. 26]; a motion for a continuance (*i.e.*, minimum of 20 days from February 27) [Doc. 27]; and a motion to establish certain procedures [Doc. 28]. These motions were addressed in an order issued on the same day, March 3, 2008 [Doc. 29]. [4]

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[4] In conformance with Local Rule 83.7, these proceedings were instituted in confidence to protect the Respondent. The proceedings remained confidential until the first day of the hearing because the Respondent failed to provide a waiver allowing the proceedings to be made public. As soon as

A hearing in this matter was held on March 5-6, 2008.[5] Present at the hearing were attorney Ralph E. Harwell, who entered an appearance for Respondent only on the morning of the hearing, and Respondent.

III. Background

A. The Show Cause Order

The conduct at issue occurred in connection with sentencing proceedings in *United States v. Vassar,* Case No. 2:05-CR-75-3 (E.D. Tenn. Feb. 28, 2007), assigned to United States District Judge J. Ronnie Greer. Respondent's conduct is specified in the Show Cause Order as follows:

> As counsel in a proceeding before United States District Judge J. Ronnie Greer, Herbert S. Moncier conducted himself in a manner constituting a violation of an order of the court, abuse of the court, disrespect for the court, contemptuous behavior directed at the court, interference and needless

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Respondent provided the waiver, the proceedings were made public. The purposes underlying confidentiality are obvious. Foremost, the rule serves to protect the attorney involved and any complainant while an investigation is conducted. As set forth herein, there is no complainant in this matter; the Show Cause Order was initiated by the court on its own initiative and thus there was no need for complainant confidentiality. Respondent's motion to make these proceedings public was conditionally granted (with the order also e-mailed to Respondent) on the very same day the motion was filed. The motion was granted subject only to Respondent's provision of a simple form--a written waiver of any objection/appeal based on the public nature of such a record and hearing. Asserting he did not receive the order, Respondent did not provide the waiver until the start of the hearing [Doc. 31]. Upon receipt of the waiver, the hearing and record were immediately ordered open, the hearing proceeded in open court, and the already voluminous record was placed on the public docket.

[5] Respondent's appeal of the criminal conviction is styled *United States v. Herbert Moncier,* No. 07-6053, and is currently pending before the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit"). On the morning of March 5, 2008, Respondent filed a motion in that appeal to stay the disciplinary proceedings, which was denied by the Sixth Circuit on that same day. *see United States v. Moncier,* No. 07-6053.

prolongation of the proceeding before the court, and obstructive behavior. Such conduct by a member of the bar of this court raises questions about Respondent's fitness to practice before this court and remain a member of the bar of this Court. Specifically:

On November 17, 2006, Herbert S. Moncier represented Michael Vassar at his sentencing hearing before Judge J. Ronnie Greer (Case No. 2:05-CR-75-3, Court File No. 683). Throughout the hearing, Respondent conducted himself in an unprofessional manner. Respondent repeatedly interrupted or spoke over the presiding judge (*see, e.g.* Case No. 2:05-CR-75-3, Court File No. 683, pp. 9, 29, 46, 53, 65, 70, 71, 95, 98). Respondent also accused the prosecution of engaging in a conspiracy to prevent him from trying cases due to his success in past trials (*see id.*, pp. 39-40, 49-50, 87-88, 91, 96).

At one point during the hearing, Respondent threatened to "sit there and remain moot," i.e. not provide a defense for his client, due to a potential conflict Respondent perceived in his representation of Mr. Vassar (*id.*, pp. 41-42). Respondent represented to the court Mr. Vassar could not speak candidly or fully with him because of his representation of an uncharged co-conspirator (*id.*, p. 43). Despite these representations of a conflict, later in the hearing, Respondent represented to the court he had "absolutely" no reason to believe he had a conflict of interest in representing Mr. Vassar (*id.*, p. 88).

The court, spanning over three pages in the record, explained, admonished, and instructed Respondent as to the appropriateness of his conduct and demeanor (*id.*, pp. 90-93). Respondent responded by contradicting the court's admonishment (*id.*, pp. 94-96).

Ultimately, the court, in exploring the conflict issue, spoke directly to Mr. Vassar, who expressed concern as to a potential conflict (*id.*, pp. 101-102). After Mr. Vassar expressed this concern, Respondent interrupted (*id.*, pp. 103-105). The court listened to Respondent's concern, then proceeded to question Mr. Vassar (*id.*, pp. 106). Respondent again interrupted the court and, despite being told to stop interrupting, continued to do so, as follows:

THE COURT: OKAY. IT'S A VERY SIMPLE QUESTION THEN, UNDERSTANDING HOW THOSE CONFLICTS CAN ARISE. DO YOU WANT MR. MONCIER TO CONTINUE REPRESENTING YOU IN THIS CASE OR DO YOU WANT ME TO SEE IF I CAN FIND SOMEBODY WHO HAS NO CONNECTION WITH [*9] ANY OTHER CODEFENDANT OR POTENTIAL CODEFENDANT IN THIS CASE?

MR. MONCIER: ONCE AGAIN, YOUR HONOR -

THE COURT: MR. MONCIER -

MR. MONCIER: HE MAKES -

THE COURT: MR. MONCIER, YOU BE QUIET.

MR. MONCIER: MAY I APPROACH THE BENCH?

THE COURT: YOU MAY STAND THERE AND DO WHAT I TOLD YOU TO DO UNTIL MR. VASSAR ANSWERS THIS QUESTION.

MR. MONCIER: FOR THE RECORD, YOUR HONOR, I OBJECT WITHOUT HIM HAVING -

THE COURT: MR MONCIER, ONE MORE WORD AND YOU'RE GOING TO JAIL.

MR. MONCIER: MAY I SPEAK TO MY -

THE COURT: OFFICERS, TAKE HIM INTO CUSTODY.

WE'LL BE IN RECESS.

[Doc. 1 at 1-3].

The Respondent was directed to file a response to the allegations set forth in the Show Cause Order, including a specific admission or denial of each of the factual allegations, specifically: "(a) that Respondent engaged in a pattern of disruptive behavior during the sentencing hearing on November 17, 2006; and (b) that Respondent disobeyed the direct order of the court during the sentencing hearing on November 17, 2006; and (c) that Respondent acted in an unprofessional and unethical manner; . . ." [*Id.* at 5].

B. Respondent's Conduct

The procedural and factual background concerning the Respondent's conduct at the November 17, 2006, sentencing hearing is set forth in *United States v. Moncier*, No. 2:07-CR-40, 2007 U.S. Dist. LEXIS 39206, 2007 WL 1577718, * 1 (E.D. Tenn. May 30, 2007), as follows:

> On November 17, 2006, Michael Vassar was scheduled to be sentenced by this Court after his conviction by a jury in case No. 2:05-CR-75 of a conspiracy to distribute and to possess with the intent to distribute cocaine. At the beginning of the hearing, Moncier, after informing chambers of an emergency matter to be taken up, stated that he had been supplied with a letter from the United States on the prior day "purporting to be a *Brady* disclosure." Representing to the court that the letter raised a possible issue pursuant to Rule 44(c), Moncier asked "to address the Court with the government present on the record in chambers . . ."
>
> After the Court cleared the courtroom of all present except for Moncier and Vassar, the government agent and the Assistant United States

Attorney representing the United States and certain court personnel, Moncier moved for a continuance of the sentencing hearing and that the matter be presented to another district judge and an independent attorney be appointed to advise Vassar concerning the Rule 44 matter. After considerable argument, these requests were denied.

Moncier then made various further attempts to postpone the sentencing hearing, including a motion to withdraw as counsel for Vassar and then to withdraw conditionally. These motions were then essentially withdrawn after Moncier informed the Court that his client wished to go forward with the hearing with Moncier representing him and that Vassar wished to address the Court. At the end of a lengthy hearing, during the Court's questioning of Vassar, the following occurred:

THE COURT: MR. VASSAR, HERE'S THE COURT'S CONCERN. WHEN WE HAVE THIS SENTENCING HEARING I WANT YOUR LAWYER TO ASK WHATEVER QUESTIONS ARE NECESSARY TO ASK TO ADEQUATELY PRESENT YOUR CASE TO THIS COURT. I DON'T WANT YOU REPRESENTED BY A LAWYER WHO IS RELUCTANT TO ASK QUESTIONS FOR-OUT OF CONCERN ABOUT WHAT THE ANSWERS MIGHT BE AS THEY RELATE TO HAROLD GROOMS. I DON'T WANT YOUR LAWYER TO BE IN A POSITION TO WHERE HE IS RELUCTANT TO CALL A WITNESS FOR FEAR THAT THE GOVERNMENT MIGHT ASK ABOUT HAROLD GROOMS AND HE DOESN'T KNOW WHAT THE WITNESS IS GOING TO SAY. YOU UNDERSTAND WHAT I'M SAYING?

MR. VASSAR: YES, SIR.

THE COURT: I WANT YOUR LAWYER'S LOYALTY TO BE TO YOU-

MR. VASSAR: THAT'S WHAT I WANT.

THE COURT: NOW, YOU UNDERSTAND HOW THOSE CONFLICTS CAN ARISE IN THE CONTEXT OF THIS CASE WITH MR. MONCIER REPRESENTING HAROLD GROOMS AND REPRESENTING YOU AT THE SAME TIME?

MR. VASSAR: I UNDERSTAND.

THE COURT: OKAY. IT'S A VERY SIMPLE QUESTION THEN, UNDERSTANDING HOW THOSE CONFLICTS CAN ARISE, DO YOU WANT MR. MONCIER TO CONTINUE REPRESENTING YOU IN THIS CASE OR DO YOU WANT ME TO SEE IF I CAN FIND SOMEBODY WHO HAS NO CONNECTION WITH ANY OTHER CODEFENDANT OR POTENTIAL CODEFENDANT IN THIS CASE?

MR. MONCIER: ONCE AGAIN, YOUR HONOR-

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THE COURT: YOU MAY STAND THERE AND DO WHAT I TOLD YOU TO DO UNTIL MR. VASSAR ANSWERS THIS QUESTION.

MR. MONCIER: FOR THE RECORD, YOUR HONOR, I OBJECT WITHOUT HIM HAVING-

THE COURT: MR. MONCIER, ONE MORE WORD AND YOU'RE GOING TO JAIL.

MR. MONCIER: MAY I SPEAK TO MY-

THE COURT: OFFICERS, TAKE HIM INTO CUSTODY. WE'LL BE IN RECESS.

2007 U.S. Dist. LEXIS 39206 [WL] at * 1-2 (footnote and citation to the docket omitted).

With regard to Respondent's conduct at the November 17, 2006, hearing, the court held:

> the decision whether a criminal defense lawyer's actions are contemptuous requires this [*13] Court to balance two very important considerations-the lawyer's duty to represent a criminal defendant vigorously and zealously and the court's duty to administer justice in an orderly and efficient fashion without contumacious interference by a misbehaving attorney. This balancing of policy considerations becomes even more difficult when dealing with a lawyer like Moncier, an attorney who by his own admission "pushes the envelope" and who is described by his own attorney as a lawyer who will pursue every issue "to the line."
>
> Also important to this Court in determining the issues raised by this matter is the context in which the incident of November 17, 2006, occurred. It is unlikely that this Court, and most other courts, would have taken the extraordinary step of citing Moncier for contempt if the incident of November 17 had been an isolated one. It was not, however. The transcript of the November 17 hearing establishes that Moncier had interrupted the Court no fewer than 14 times during the November 17 proceedings before the Court's order to Moncier to say not one more word. In addition, this case must also be considered in the context of Moncier's long experience in the defense of criminal cases in the federal courts. Moncier has practiced law for 38 years and his actions of November 17, 2006, cannot be viewed as the innocent mistake of a young, inexperienced lawyer or as an aberrant act. Although Moncier's actions on November 17 were decided in

a "split second", his decisions were made in the context of a long career of trying cases and dealing with judges and courts under circumstances where decisions and judgments often must be made immediately and without the luxury of extensive forethought.

. . .

Throughout the course of Moncier's appearances before this Court, this Court has admonished Moncier for a wide range of misconduct, has lectured him concerning the Court's expectations as to professionalism and civility and has threatened him with a finding of contempt on prior occasions, all to no avail. This case, ultimately speaking, presents a very simple issue of whether the presiding judicial official will control the course of the proceedings in the courtroom or whether contumacious lawyers will be permitted to take control.

. . .

Moncier's conduct in this case, however,- *i.e.* repeatedly interrupting the court after a warning not to do so and in disobedience [*15] to the court's directive commanding his silence-is a clear case of misbehavior as contemplated by the statute and is well within "the range of contumacious conduct disruptive of judicial proceedings and damaging to the court's authority" punishable as criminal contempt.

. . .

Although Moncier argues that he lacked the intent to obstruct justice (discussed below), he has not seriously disputed that his actions on November 17, 2006, had a disruptive effect on the proceedings and resulted in a delay of those proceedings. One point raised by Moncier, however, does bear some discussion here. Moncier has asserted through his

testimony at trial and in an affidavit filed in support of his pre-trial motion to dismiss that the Court had no right to question his client (i.e. that Rule 44 did not permit the Court's questions), that he had no idea why the Court was asking the questions (except possibly to "clean up the record") and that his client had communicated to him through eye contact and body language that he wished to talk to him before answering the Court's questions. Such assertions by Moncier lack any credibility.

As the transcript of the November 17, 2006, proceeding reflects, it was Moncier himself who suggested to the Court that there existed "an issue that pertains to Rule 44(c)." [Doc. 688, page 2]. The issue had arisen, according to Moncier, because the United States had provided him, on the day before the sentencing hearing, information relating to a statement made by a co-conspirator attributing to Vassar a potentially incriminating statement about another of Moncier's clients, an unindicted co-conspriator [sic]. Moncier then attempted to convince the Court to refer the matter to another district judge for hearing and have independent counsel appointed to advise Vassar about Moncier's possible conflict of interest. Moncier asserted, during the hearing, that his client, Vassar, wasn't going to tell him (Moncier) if he had made the statement because of his representation of the other client. [Doc. 683, page 43]. Moncier wanted Vassar to have the benefit of independent counsel's advice on whether to cooperate with the government concerning the contents of the alleged statement in order to seek a motion for downward departure for his assistance. After the government indicated that it had no interest in debriefing Vassar, the Court denied both requests.

After further attempts to delay the sentencing hearing, Moncier informed the Court that Vassar had told him during a recess that Vassar did not want

him [Moncier] to be disqualified [Doc. 683, p. 78], that he [Moncier] did not "have a conflict", [*Id.*, p. 88] and that Vassar wanted to address the Court. [*Id.*, pp. 88, 89] Moncier specifically represented that if he could have the lunch hour to work with his client, he would be ready to proceed with the sentencing hearing at 1:30 p.m. The United States announced that it did not oppose the proceeding going forward with Moncier representing Vassar "if Mr. Vassar represents ... to the Court that he wishes Moncier to continue as his counsel for this sentencing hearing." [*Id.*, pp. 93-94]. Just minutes later, the Court asked Vassar to step to the podium and began to question him with regard to whether he wanted Moncier to continue as his attorney. It was shortly after that questioning began that the above exchange took place, leading to this proceeding.

Moncier's insistence that Rule 44 did not permit the Court to question Vassar or that he did not know what the Court was doing is patently absurd and simply not credible in view of the events of November 17. Rule 44 in fact required the Court ("the court must promptly inquire ...") to question Vassar about the possible conflict of interest called to the attention of the Court by his attorney . . . .

Also, in light of Moncier's repeated requests to the Court to question Vassar or to allow Vassar to address the Court, as well as the government's assertion just minutes before that the Court should determine if Vassar wanted Moncier to continue as his attorney, Moncier's assertion that he did not have any idea why Vassar had been called to the podium lacks any credibility.

Moncier's claim that he knew Vassar wanted to speak to him is likewise incredible. For one thing, Moncier testified that he made his observation upon Vassar being called to the podium; yet, he made no request to consult with his client during a lengthy exchange between the Court and Vassar (taking up

> eight pages of the transcript (pages 99-106) and including efforts by Moncier to persuade the Court to rephrase its questions), all of which occurred *after* Vassar was called to the podium. Secondly, Moncier's testimony that it was obvious during the proceeding at the podium that Vassar wanted to talk with him conflicts with both the transcript and with the Court's own observations. At no time during these proceedings did Vassar ever request time to consult with Moncier. During the entire proceeding at the podium, Vassar listened intently to the Court's questions and made direct eye contact with the Court. Vassar never exhibited confusion but rather affirmatively acknowledged the Court's inquiry and his understanding of the inquiry.
>
> . . .
>
> Moncier's trial testimony also appears to contradict his pre-trial affidavit where he seems to suggest that his true motivation was that he did not want Vassar to answer the Court's question because "clients in criminal cases should never answer questions prior to being advised as to what questions they are going to be asked and them being advised as to the purpose for the question and whether my client should respond." [Doc. 10-3, para. 18]. Moncier cites no authority for such a view of the bounds of proper advocacy. A criminal defense attorney has no absolute right to interrupt proceedings whether conducted by adversary counsel during cross examination or by the court to advise a client how or whether to answer a question.

2007 U.S. Dist. LEXIS 39206 [WL] at * 3-6 (internal case citations and footnotes omitted).

In *Moncier*, the court addressed whether Respondent's conduct was criminal contempt pursuant to 18 U.S.C. §§ 401(1) & 401(3) for obstruction of justice and disobedience of a court order-not whether the conduct also constituted a violation of the Rules of Professional Conduct or brought disrepute upon the bar

or the court in violation of Local Rule 83.7. *Id.* After finding Respondent's conduct was criminal contempt, the court addressed its two options to address such criminal contempt, a fine or imprisonment; the court did not address attorney discipline under Local Rule 83.7 in any fashion. 2007 U.S. Dist. LEXIS 39206 [WL] at * 10. Subsequently, Respondent was sentenced, and a final judgment of conviction was entered. [6]

C. Respondent's Response

On February 25, 2008, Respondent responded to the Show Cause Order (the "Show Cause Response") by quoting portions of the Show Cause Order followed by a "response." The Show Cause Response is paraphrased as noted below.

The Show Cause Order states:

> As counsel in a proceeding before United States District Judge J. Ronnie Greer, Herbert S. Moncier ("Respondent") conducted himself in a manner constituting a violation of an order of the court, abuse of the court, disrespect for the court, contemptuous behavior directed at the court, interference and needless prolongation of the proceeding before the court, and obstructive behavior. . . .

In response, Respondent: (1) admits he appeared in a proceeding before Judge Greer; (2) admits Judge Greer found he violated an order of the court; and (3) admits Judge Greer found his actions were contemptuous toward the court [Doc. 13 at 3]. Respondent contends, however:

> the findings of [Judge Greer] are on appeal to the Sixth Circuit Court of Appeals and this Court should abstain from ruling in this case because of the potential effect that appeal will have on *res judicata;*

---

[6] It is this final judgment of criminal contempt that Respondent has appealed to the Sixth Circuit. The court in *Moncier* also denied in part and granted in part Respondent's motion to stay the sentence pending appeal [Case No. 2:07-CR-40. Doc. 75].

> collateral estoppel; or double jeopardy pertaining to Judge Greer's findings

[*Id.*]. Respondent denies that: (1) he intentionally violated the court's order; (2) he intended any disrespect for the court; or (3) his conduct constituted disrespect for the court [*id.* at 3-16].

The Show Cause Order states:

> Such conduct by a member of the bar of this court raises questions about Respondent's fitness to practice before this court and remain a member of the bar of this Court.

In response, Respondent denies that his conduct shows that he is unfit to practice before this court, particularly when it is considered within the context in which it occurred [Doc. 13 at 16-17].

The Show Cause Order states:

> On November 17, 2006, Herbert S. Moncier represented Michael Vassar at his sentencing hearing before Judge J. Ronnie Greer (Case No. 2:05-CR-75-3, Court File No. 683). Throughout the hearing, Respondent conducted himself in an unprofessional manner. Respondent repeatedly interrupted or spoke over the presiding judge (*see, e.g.* Case No. 2:05-CR-75-3, Court File No. 683, pp. 9, 29, 46, 53, 65, 70, 71, 95, 98).

The transcript of the November 17, 2006 hearing (the "transcript" or "Tr.") [7] reflects the following:

---

[7] The transcript appears in *United States v. Vassar*, No. 2:05-CR-75-3 at Doc. 683. In addition, at the March 5-6 hearing, Respondent introduced a copy of the transcript that includes an additional proceeding after he was taken into custody where Attorney John T. Rogers ("Attorney Rogers") made a special appearance with Respondent. Respondent's transcript is marked as exhibit one in Respondent's Exhibit ("Exh.") 1 admitted during the March 5-6 hearing. A copy of the portion of the proceedings which occurred after Respondent was taken into custody and represented by Attorney Rogers was also admitted as Exh. 3 during the March 5-6 hearing.

The Court: And reset Mr. Phillips after Mr. Vassar and reset --

Mr. Moncier: I don't know. . . .

(Tr. 29).

The Court: Until the next thing comes up that you didn't know about and you raise this issue again. I mean, you --

Mr. Moncier: Judge --

(Tr. 46).

The Court: You know, it's possible he could do both, he could hide his assets --

Mr. Moncier: Only if they told the Court.

(Tr. 53).

The Court: This is a theory defense not already indicated in all these pleadings you've filed? I mean, the theory of your defense clearly in these pleadings is that Mr. Vassar's case --

Mr. Moncier: Oh, this is --

(Tr. 65).

The Court: I hope you did it when you undertook the joint representation --

Mr. Moncier: I did.

The Court: -- of Harold Grooms and Michael Vassar.

(Tr. 70-71).

The Court: . . . I may have inquired --

Mr. Moncier: And during that inquiry we had a lengthy hearing that the court needs to review. . . .

(Tr. 71).

> The Court: Mr. Moncier, you don't have to justify your conduct. I told you --
>
> Mr. Moncier: Well, no --
>
> The Court: I told you what I don't like about it.

(Tr. 95). [8]

In response, Respondent admits he was present at the hearing representing Vassar, but denies he conducted himself throughout the hearing in an unprofessional manner [Doc. 13 at 17-18]. Respondent also states "the transcript reflect[s] uncompleted sentences by both the District Judge and Respondent." [*Id.* at 17].

The Show Cause Order states:

> Respondent also accused the prosecution of engaging in a conspiracy to prevent him from trying cases due to his success in past trials (*see id.*, [Case No. 2:05-CR-75-3, Court File No. 683], pp. 39-40, 49-50, 87-88, 91, 96).

The transcript reflects the following:

> Mr. Moncier: I believe they sandwiched it between some very exculpatory information simply to see what I would do, and I did what I had to do. . . . These people don't like me . . . . I have no personal animosity toward them, but they don't want people to hire me to try jury trials. It's - - you shake your head at that.
>
> The Court: I do. That's ridiculous, Mr. Moncier.
>
> Mr. Moncier: Okay. Well, nevertheless, it's not ridiculous when you hear the things that I hear from people that they're talking to about cooperation . . . .

---

[8] The Show Cause Order indicates interruptions by Respondent are also reflected at pages 9 and 98 of the transcript. While pages 9 and 98 of the transcript do not indicate interruptions, the transcript at page 7 does. In any event, in *Moncier* the court held Respondent interrupted him some 14 times. 2007 U.S. Dist. LEXIS 39206, 2007 WL 1577718 at * 3.

(Tr. 39-40).

> Mr. Moncier: I just got through telling you that I was a little bit concerned that you would feel that way . . . . What's going on here is that I think that the government is trying to set me up. . . . So what's really going on here, I think, is that because I have tried a number of cases successfully, including this case, because I have the reputation of trying cases against the government and not doing what they want in this community, they're coming after me. That's what I think is going on. . . .

(Tr. 49-50).

> Mr. Moncier: The point of the matter is that the government set this up. They know that you don't like the, you don't like the way I've presented my client's case at sentencing. I know that the Court has been irritated with me in this trial and other trial. I know that the Court does not like the style by which I represent my clients before juries that I -- that, that has resulted in the series of fairly successful results. . . .

(Tr. 87).

> Mr. Moncier: I do plead things that I believe need to be pled, and I don't say them in the bars or on the streets -- bars is a bad choice of words. I don't say them outside the court room. When I have information that I need to bring to the attention of the Court, I do it. Now, the, the issue is though that the government . . . is they don't want to have me have any success because what happens is people who want to go to trial are going to come and hire me, and it's going to be the same thing in those cases; and so when the government goes out and they talk to these people about cooperation and such like that, they also have a vested interest in, in

> whether that attorney is going to aggressively defend the case or not.

(Tr. 96).

Respondent denies the above statements establish he is unfit to practice before this court, but admits he made the statements [Doc. 13 at 18-19].

The Show Cause Order states:

> At one point during the hearing, Respondent threatened to "sit there and remain moot," i.e. not provide a defense for his client, due to a potential conflict Respondent perceived in his representation of Mr. Vassar ([Case No. 2:05-CR-75-3, Court File No. 683], pp. 41-42).

The statement at issue appears in the following portion of the transcript:

> Mr. Moncier: Well, if, if what has to be done has to be done, you know, that's fine. I simply cannot -- I'm not going to walk into this trap. I'm not going to do it. I'm not going to put the -- I had a --
>
> The Court: You telling me you're just going to walk out of here this morning whether I let you withdraw or not?
>
> Mr. Moncier: Of course not.
>
> The Court: What do you mean, I'm not walking into this trap?
>
> Mr. Moncier: I mean if I have to sit there and remain moot, I will sit there and remain moot.
>
> The Court: In other words, you wouldn't provide him a defense?
>
> Mr. Moncier: I can't provide him a defense. It would be an ineffective assistance of counsel to do

> so. Everybody is walking into a 2255 in this situation.
>
> The Court: It appears to me that you're setting that up.
>
> Mr. Moncier: I'm not setting this up.

(Tr. 41-42).

Respondent admits making the above statement, but denies the statement [9] violated the "Code of Professional Responsibility"[10] or that the statement establishes that he is unfit to practice or remain a member of this court [Doc. 13 at 20-21]. Respondent asserts the context of the statement and his explanation for the statement will show the statement is not a basis for discipline [*id.*].

The Show Cause Order states:

> Respondent represented to the court Mr. Vassar could not speak candidly or fully with him because of his representation of an uncharged co-conspirator ([Case No. 2:05-CR-75-3, Court File No. 683], p. 43)

The representation at issue is set forth in the transcript as:

> Mr. Moncier: Now, if my client has known something, as remote as it might be, that pertains to Harold Grooms, that is that Harold Grooms offered

---

[9] Although not raised by Respondent, the word "moot" in the transcript may refer to remaining "mute," but in any event Respondent's comment was clarified by Judge Greer who specifically asked Respondent if he meant he would not provide a defense as indicated in the Show Cause Order.

[10] The Show Cause Order references the Rules of Professional Conduct, but Respondent refers to the "Code of Professional Responsibility." Respondent's references to the "Code of Professional Responsibility" will be construed as referring to the Rules of Professional Conduct, Tenn. Sup. Ct. R. 8, which set forth the ethical standards relating to the practice of law and to the administration of justice in the courts of the State of Tennessee, effective March 1, 2003.

> to give him some drugs, if he knows that, and if he understands that that is within these things that the government was wanting, that he needs to know that. He isn't going to tell me if Harold Grooms said that because he knows I represent Harold Grooms.

(Tr. 43).

Again, Respondent admits making the statement, but denies the statement violated the Code of Professional Responsibility and denies the statement establishes he is unfit to practice or remain a member of this court [Doc. 13 at 21-22]. Respondent asserts the context of the statement and his explanation for the statement will show the statement is not a basis for discipline [*id.*].

The Show Cause Order states:

> Despite these representations of a conflict, later in the hearing, Respondent represented to the court he had "absolutely" no reason to believe he had a conflict of interest in representing Mr. Vassar ([Case No. 2:05-CR-75-3, Court File No. 683], p. 88).

The transcript at the referenced pages reflects the following:

> Mr. Moncier: I knew it was coming when I filed my notice. The whole reason I filed my notice when I did is to let everybody know that this person that they threw all the publicity out against is out there; and if they have some reason to believe that I have a conflict, let's air it out.
>
> I had absolutely and I have today no reason to believe that I have actual conflict of interest between Harold Grooms and Michael Vassar, none, and I don't. However, I'm painfully aware, painfully aware of the burdens on the courts on 2255 petitions, and that's exactly why I brought it to the attention of the Court because in my opinion what the government was doing, they don't care about Mike Vassar, they

> were trying to come up and at a later time suggest that I had a conflict of interest without ever telling anybody about it. If I didn't do it. There is no conflict of interest. Mr. Vassar wants to address the court, and this is a setup to deny Mr. Vassar the counsel of his choice in this case.

(Tr. 87-88).

Respondent asserts the context of the statement will show that he represented he had only a potential conflict of interest [Doc. 13 at 23]. Respondent asserts the context of the statement and his explanation for the statement will show the statement is not a basis for discipline [*id.*].

The Show Cause Order states:

> The court, spanning over three pages in the record, explained, admonished, and instructed Respondent as to the appropriateness of his conduct and demeanor ([Case No. 2:05-CR-75-3, Court File No. 683], pp. 90-93). Respondent responded by contradicting the court's admonishment (*id.*, pp. 94-96).

The dialogue at issue is:

> The Court: Before I hear from the government, Mr. Moncier, you just made some statements about what you know about this Court's attitudes about you and the way you do things. There have been a number of occasions when I have complimented you in the open courtroom on the success you've had in defending criminal defendants in this Court. Contrary to what you might see as some disappointment on my part when you get an acquittal, that's not the case. I've never been disappointed or upset when you've gotten an acquittal in this court, nor have I expressed an overall dislike to the way you present your cases.

What I have said to you on numerous occasions is that I do not like the lack of civility that you bring to cases; that I do not like the lack of candor that you often bring to cases; that I do not like the fact that you on occasion misrepresent facts before a jury or before a witness; that I don't like the aspersions you cast, the personal aspersions that you cast at times upon the professionals who oppose you, nor do I like the aspersions you cast upon the Court at times . . . I do not like the fact that you'll make an argument before the jury that I sustained an objection to or, or instructed you not to make . . . .

You think the government is out to get you because you have success. You think the Court is against you because you have success. Aside and apart from the egotistical implications that that statement contains, they're just simply wrong. I don't resent you the success you've had . . . I've bent over backwards . . . to make sure that Mr. Vassar got the counsel of his choice in this case.

I, I say that only because you state for the record . . . a record that I'm sure will be . . . reviewed by an appellate court statements like that as if they are fact. Much of this comes from your choice of words, as I pointed out to you on Wednesday. You say you have no personal animosity toward the government, you cast no personal aspersions . . . and yet you used words like . . . torture, extort; or you use words like . . . they concocted. . . . I don't know whether you just, it's just a poor choice of words or whether you intentionally use those words; but that's what I disapprove of.

I don't disapprove . . of you aggressively representing your clients, that's what you ought to do . . . that's what you've had an obligation to do. . . .

It does, however, bother me in addition that you've told me in a sidebar conference this morning that if this hearing goes forward today, you intend to

> sit there at counsel table mute and render ineffective assistance of counsel . . . and now you tell me that you're prepared to go forward, Mr. Vassar wants you to go forward. Those are the kinds of things, Mr. Moncier, that give me heartburn about your conduct. You can't have it both ways. I mean, either you're prepared to go forward and do what you need to do to represent him or you're not.

(Tr. 90-93). Respondent's response was:

> Mr. Moncier: First, I would like to briefly respond to what the court said. I have raised issues as to how the government prosecutes these cases, not only in this case, but previous cases .. . . I have received information from people that I've talked to, agents of the government, and the proffer that I filed from the very jailhouse person Monday of this week is typical of the type of information that I have received with regard to witnesses that I have interviewed, the process in which witnesses are interviewed here; so I stand on the basis of the records that I have produced to the Court in this case as a reasonable basis for me to raise these issues.
>
> Now, if the Court, for example, were to find that what the government is doing to get people to cooperate and testify is as is indicated by the records that I've placed before the Court, then I believe that the term "torture" to a person, while it was a harsh term, it is in fact a term that unless you do this, you're going to spend the rest of your life in prison, I don't know what other than that that is.
>
> The Court: Mr. Moncier, you don't have to justify your conduct. I told you --
>
> Mr. Moncier: Well, no --
>
> The Court: I told you what I don't like about it.
>
> Mr. Moncier: Okay.

> The Court: Whether you agree with that or not is irrelevant. If you think the words that you used are justified, that's fine.
>
> Mr. Moncier: And with regard, your honor, with regard to the fact, the fact that I do plead things that I believe need to be pled . . . I don't say them outside the court room. When I have information that I need to bring to the attention of the Court, I do it. Now, the, issue is though that the government . . . they don't want to talk to my client . . . and the reason is, is they don't want to have me have any success because what happens is people who want to go to trial are going to come and hire me, and it's going to be the same thing in those cases; and so when the government goes out and they talk to these people about cooperation and such like that, they also have a vested interest in, in whether that attorney is going to aggressively defend the case or not.

(Tr. 94-96).

Respondent "admits the transcript of November 17, 2006" and also admits "the transcript speaks for itself" [Doc. 13 at 24]. Respondent denies contradicting the court's admonishment and also denies his response constitutes a violation of the Code of Professional Responsibility or establishes that he is unfit to practice before this court [*id.*].

The Show Cause Order states:

> Ultimately, the court, in exploring the conflict issue, spoke directly to Mr. Vassar, who expressed concern as to a potential conflict ([Case No. 2:05-CR-75-3, Court File No. 683], pp. 101-102). After Mr. Vassar expressed this concern, Respondent interrupted (*id.*, pp. 103-105). The court listened to Respondent's concern; then proceeded to question Mr. Vassar (*id.*, pp. 106). Respondent again interrupted the court and, despite being told to stop interrupting, continued to do so, ...

The transcript reflects the court spoke directly to Vassar as follows, in pertinent part:

> The Court: You understand that as a result of this sentencing hearing we're about to have that I could sentence you to 30 years in federal prison?
>
> Mr. Vassar: Yes, sir.
>
> The Court: Even if Mr. Moncier's ultimate loyalty is to Harold Grooms, you still want him to represent you?
>
> Mr. Vassar: I don't understand what you mean by "representing me", representing me how? He came to court.
>
> The Court: Well, I mean, if there came a decision that had to be made, do I look out for Michael Vassar's interest or do I look out for my other client Harold Grooms's interest?
>
> . . .
>
> Mr. Vassar: No. I want him to represent me like he's supposed to represent me. I wouldn't want him not to represent me on account of Harold Grooms . . . .

(Tr. 100-101).

As the court was having a discussion with defendant Vassar about whether he wished to be represented by Respondent, Respondent interjected:

> Mr. Moncier: Your Honor, I would request that the Court speak with Mr. Vassar in private as to the . . . to where I would have my loyalties to Harold Grooms different from his.
>
> The Court: I can't possibly anticipate that.
>
> Mr. Moncier: Well, you know this one.
>
> The Court: I'm sorry?

Mr. Moncier: You certainly know this one, and you certainly know what we talked about at the previous hearing. The government can bring to your attention any other information that they may suggest. That's why I always suggested that we have another judge hear this.

We could say the same thing about anybody else . . . . But we've got to find out whether there is any -- we've got to find out whether there's anything to it, at least as far as he knows what we're talking about; and, and since we're -- we've gone this far, the question that I think the Court needs to talk to him about is whether there's any truth whatsoever to what was presented to him this morning or whether that's just somebody trying to tell the government something to get something and whether he thinks that anything in this sentencing hearing would make me -- I'm not quite sure what loyalties I would have . . . to Harold Grooms with regard to that.

The Court: You've got an absolute loyalty duty to Harold Grooms just like you do to Michael Vassar. Don't stand there and tell me you don't know what loyalty you've got to him.

Mr. Moncier: Well, wait a minute. No. How am I going to do something different in his trial today?

The Court: I don't know, but I can think of one.

Mr. Vassar, Mr. Moncier has now been placed in a position where he's got to be make a decision this afternoon; and that decision is, do I call Mark Thornton to the witness stand in view of the fact that it now appears that Mark Thornton is potentially going to give some testimony that implicates Harold Grooms. He's got to make a decision, do I call Mark Thornton and run the risk that he says something here in this open courtroom that gets reported in the newspaper that implicates my client Harold Grooms?

Mr. Moncier: I'm sorry, your honor, I'd like for you to also present to him what I was more concerned with.

The Court: I understand what you're concerned with.

Mr. Moncier: My concern is, my concern is whether I call Mark Thornton to testify to the things that I intended to have him testify to knowing that he had potentially made this other statement to the government that my client knows something that my client said he didn't know; that's the problem, is do I call Mark Thornton for the good parts of what Mark Thornton adds to this matter, but Mark Thornton knowing that the government is going to lay back and they're going to cross examine him and you're going to let them go beyond the scope of direct . . . If you do, let them go . . . into this additional information that the Court now knows about that has the potential of flying into the face of positions that were previously taken; and are we going to get into a mini trial as to all of those things that were said . . . is that going to open up that transcript of that hearing we had before. . . . I mean, we went through all of that.

(Tr. 103-05).

The court then again addressed Vassar:

The Court: Mr. Vassar, here's the Court's concern. When we have this sentencing hearing I want your lawyer to ask whatever questions are necessary to ask to adequately present your case to this Court. I don't want you represented by a lawyer who is reluctant to ask questions for -- out of concern about what the answers might be as they relate to Harold Grooms. I don't want your lawyer to be in a position to where he is reluctant to call a witness for fear that the government might ask about Harold Grooms and

> he doesn't know what the witness is going to say. You understand what I'm saying?
>
> Mr. Vassar: Yes, sir.
>
> The Court: I want your lawyer's loyalty to be to you --
>
> Mr. Vassar: That's what I want, your Honor.
>
> The Court: -- And nobody else.
>
> Mr. Vassar: That's what I want.
>
> The Court: Now, you understand how those conflicts can arise in the context of this case with Mr. Moncier representing Harold Grooms and representing you at the same time?
>
> Mr. Vassar: I understand.

(Tr. 106). Whereupon the culminating exchange excerpted in the Show Cause Order occurred. *See* (Tr. 106-07).

Respondent again "admits the transcript of November 17, 2006" and also admits that "the transcript speaks for itself" [Doc. 13 at 25]. Respondent denies his conduct constitutes a violation of the Code of Professional Responsibility or establishes that he is unfit to practice before, or remain a member of, this court [*id.*].

Respondent also "affirmatively asserts" this court should abstain from proceeding with the disciplinary matter pending his appeal of his criminal contempt conviction and claims further action by the court is barred by "prior jeopardy" and that *res judicata* and collateral estoppel apply to prevent "further discipline as the court has already imposed a sentence in the criminal contempt proceeding." [*Id.* at 25]. Respondent also asserts his conduct was "goaded by the wrongful conduct of the prosecution team." [*Id.* at 25-26].

Respondent's "alternative response" incorporates the above and contends, in essence, that his conduct at the November 2006 hearing does not support the conclusions drawn in the Show Cause Order and his conduct in not subject to disciplinary action [Doc. 22].

IV. The March 5-6, 2008 Hearing

A. Respondent's Testimony

Respondent was the sole witness at the March 5-6, 2008 hearing. In summary, Respondent testified concerning his educational background, his service in the Army in the Judge Advocate General's Corps, his 38 years of legal practice, which includes a two-year stint as an assistant district attorney general in Knox County prior to engaging in private practice, his family life, including his care for a disabled adult son, and his volunteer duties at his church in Knoxville. Respondent also described his membership in, affiliation with, awards from, and participation in professional associations, including the Tennessee Association of Criminal Defense Lawyers ("TACDL"). Respondent is a former president and board member of TACDL. His testimony included information about his support of, participation in, or teaching of continuing legal education seminars in criminal law and ethics topics under the auspices of some of the professional organizations of which he is a member. Respondent is a member of the bar of this court and other district courts, the Sixth Circuit and other appellate courts, and the Supreme Court. Based upon his membership in good standing in this court, Respondent has been admitted *pro hac vice* in several other federal courts. Respondent was one of the first attorneys to receive certification from the Tennessee Supreme Court in the area of "Criminal Trial" and he enjoys an "AV" peer review rating in Martindale-Hubbell.

Respondent described particular legal actions he had been involved in as counsel. In particular, Respondent gave extensive testimony concerning cases he handled in this court, with particular emphasis on criminal cases he handled before Judge Greer. Respondent testified he had known Judge Greer for a long time and occasionally represented clients in matters where Judge Greer represented other parties prior to Judge Greer's appointment to the federal court bench.

Respondent testified regarding various actions that occurred in a series of cases in the court that he contends contributed to, or resulted in, the disciplinary actions against him by this court and

his criminal contempt judgment. For instance, prior to the November 17, 2006 hearing, he brought a motion for Judge Greer to recuse or disqualify himself in *United States v. Michael Snipes* [Case No. 2:03-CR-70, Doc. 40, 41]. Respondent contends that after he filed the motion to recuse, his relationship with Judge Greer became more "formal." Respondent also said his relationship with the United States Attorney's office in Greeneville is formal and strained as a result of his zealous advocacy on behalf of his clients. Respondent's counsel states it is not Respondent's position that Judge Greer retaliated against or has a personal bias against Respondent. However, Respondent testified his actions on November 17, 2006, were viewed differently because of the strain and formal nature of his relationships, and he contends another attorney with a more amicable relationship with the court and/or the United States Attorney's office would not have been placed in jail or been the subject of the Show Cause Order.

With respect to all of the allegations in the Show Cause Order, Respondent, in summary, testified his actions on November 17, 2006, were justified because he allegedly was meeting his ethical duty to his client. Respondent testified he did not intend to interfere with, prolong, or obstruct the proceedings or be disrespectful to the court. Respondent stated neither his tone nor his attitude at any time during the hearing was disrespectful. He said his tone was not unusual, sassy, mocking, deviant, belligerent or challenging.

Respondent stated he never used the word "conspiracy," but did convey to the court that there had been a "concerted effort" by the United States Attorney's office to convince criminal defendants not to hire him.[11] While Respondent admitted he made the statement he would remain "moot," he stated he was not actually threatening to abrogate his responsibility to represent his client and that he was prepared to go forward with the

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[11] Respondent stated he had not been hired, with one exception, by any criminal defendant charged in the Greeneville division since 2004 or 2005. He also stated that as the result of the November 2006 hearing, his federal criminal trial practice had virtually stopped. Based on his pending federal court cases, Respondent claims over one million dollars in fees could be jeopardized by this disciplinary action.

sentencing hearing. Respondent testified his statement was a "hypothetical" and merely a poor selection of words. Respondent stated he believed that if the court decided to go forward with Vassar's sentencing in the face of a potential conflict of interest, he could ask for permission to remain "moot" rather than doing any harm to the client. Respondent admitted his colloquy with the court occurred and reiterated his position with respect to representing Vassar. Respondent denied responding to the court's admonition with a contradiction saying his response was a statement of his position with regard to the issues raised by the court, not a contradiction.

With respect to the culminating portion of the transcript, Respondent admits he heard the court tell him not to say another word. He denies, however, he intended to violate an order of the court, prolong the proceedings, disrupt the proceedings, or to show disrespect for the court by speaking after the order. Respondent stated the court "misperceived" his actions. Respondent acknowledged he did not have the authority to simply disobey the court's order and that the court did not ask him to do anything unethical during the November 17, 2006, hearing. Respondent stated his client was attempting to talk to him and that he spoke, despite the admonitions first to be silent and then not to say another word, because he was attempting to clarify the order. Respondent testified that when the court told him not to say another word, he did not believe that the court intended for him not to be able to speak to his client. Respondent insisted he spoke after the order not to speak only to obtain clarification as to whether he could speak to his client.

With regard to his fitness to practice law, Respondent stated he has never been the subject of any form of discipline by any court or Board of Professional Responsibility, other than a reprimand he received from this court in 2005.[12] With respect to that reprimand, Respondent said he requested a hearing under Local Rule 83.7, but no hearing was held.

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12 Subsequently, Respondent submitted a list of "other instances" involving apparent conflict with judges that he does not consider to be discipline, but that he thought might come to the court's attention in its investigation [Doc. 56 & 60].

Respondent testified about the events which occurred after he was taken into custody and since November 2006. Respondent stated he was first placed in a holding cell, then taken to the grand jury witness room where he called his law office and also talked to Attorney Rogers and asked him to convey his apology and remorse to the court. Respondent stated he asked Attorney Rogers to tell the court he was deeply sorry he had conducted himself in a manner resulting in his being taken into custody and wished to apologize for his actions because he never intended to do anything improper or disrespectful (and does not believe he did) at the November hearing. Respondent stated his apology was true then and now. The transcript reflects that on the afternoon of November 17, 2006, Attorney Rogers appeared before the court on behalf of and with Respondent and stated:

> Before I go on, you honor, though I want to make it clear to you that Mr. Moncier has expressed to me in the brief time that I spent with him the fact that he was only trying to make an objection; that he intended no disrespect to the Court at that time and that he is very sorry that by, by, by attempting to utter his statement that he violated this Court's order when he felt he was compelled to do so.

(Exh. 1 at Tab 1 at 110-11; Exh. 3 at 110-11).

At both the beginning and end of his testimony, Respondent stated he has deep regret about the November 2006 hearing and he offered an apology. He stated he realized this situation had been a difficult period for everyone involved. He repeatedly stated he did not intend to be disrespectful or to delay or disrupt the proceedings. He maintained his actions were based on his seeking to represent the best interests of Vassar within the limits of the ethics rules. He further stated he did not intend to violate the court's order, but was merely asking for clarification as to whether he could speak with his client. He contends his actions were "viewed through a different lens" because of the "strained relationships" which he has with the United States Attorney's office and the court allegedly due to his zealous representation of

clients.[13] " Respondent contends another attorney with a better relationship with the court would not face the same disciplinary proceedings for similar conduct.

B. Documents Presented

At the March 5-6, 2008 hearing, Respondent presented the following evidence in addition to his testimony:

> A copy of the November 17, 2006, transcript and certain pleadings filed in this matter - Exh. 1;
>
> A copy of the order addressing Respondent's motions of March 3, 2008 - Exh. 2;
>
> An excerpt of the transcript of the afternoon proceedings on November 17, 2006 - Exh. 3;
>
> Respondent's analysis of the transcript - Exh. 4;[14]
>
> An *amicus curiae* brief filed by TACDL in the criminal contempt proceeding - Exh. 5;
>
> The letter of AUSA M. Neil Smith, dated November 16, 2006, concerning the case of *United States v. Vassar* - Exh. 6;
>
> The affidavit of Vassar, dated April 3, 2007 - Exh. 7; and,
>
> A summary of cases currently pending in federal court in which Respondent is counsel of record (and which could be affected by any disciplinary action) - Exh. 8.

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13 Respondent expressed a belief that his style of advocacy results in a lack of acceptance. This apparently is a longstanding belief going back to his days in the Army where he contends he was not accepted "by the powers that be" as a result of his "everything he has" style of advocacy.

14 In large part, the analysis is Respondent's recollection of what transpired at various points in the hearing where the transcript includes the court reporter's use of dashes.

Included in Respondent's Exh. 1 is a declaration from attorney William W. (Tripp) Hunt, III, dated March 4, 2008 [Exh. 1 at Tab 2]. Attorney Hunt has served as disciplinary counsel for the BPR since 1981 [*id.* at 1, P 3], and his declaration states in relevant part:

> 5. With regard to this complaint, I am told that on November 21, 2006, Mr. Moncier orally reported to then Chief Disciplinary Counsel Lance Bracy events that had occurred in the courtroom of United States District Judge J. Ronnie Greer on November 17, 2006. I am in receipt of Mr. Moncier's detailed written report dated December 8, 2006, of those same events. Since that time, Mr. Moncier has provided information to Disciplinary Counsel of the proceedings with regard to the charges against himself by U.S. District Judge Greer including providing transcripts when and as they became available . . . .
>
> 6. On June 14, 2007, by written complaint addressed to the present Chief Disciplinary Counsel Nancy S. Jones, U.S. District Judge J. Ronnie Greer filed a complaint . . . against . . . Moncier which in pertinent part included the events previously reported by Mr. Moncier as having taken place in November 17, 2006. In particular, U.S. District Judge Greer reported that as a result of the actions of Mr. Moncier, he . . . had found Mr. Moncier guilty of criminal contempt . . . .
>
> . . .
>
> 9. Disciplinary Counsel has been advised by Mr. Moncier that an appeal to the United States Court of Appeals for the Sixth Circuit has been timely filed . . . and that the appeal is presently pending . . . .
>
> 10. Based upon all of the above . . . Disciplinary Counsel has not filed a Petition for Discipline nor has Disciplinary Counsel filed a Petition for Temporary Suspension of Mr. Moncier from the

> practice of law in the State of Tennessee. Rather, Disciplinary Counsel has decided to await the opinion of the Sixth Circuit Court of Appeals with regard to the findings of U.S. District Judge Greer relative to Mr. Moncier before proceeding further with regard to the complaint presently pending before the [BPR].
>
> 11. Disciplinary Counsel is not prepared to render an opinion as to whether Mr. Moncier has violated the Tennessee Rules of Professional Conduct nor whether discipline would be appropriate until after the Sixth Circuit . . . has determined and reported their decision.
>
> 12. The records of the Disciplinary Counsel reflect that Mr. Moncier has not been previously disciplined for violating the Tennessee Rules of Professional Conduct and, except for his self report and the complaint of U.S. District Judge Greer, is, otherwise, in good standing with the [BPR].

[*Id.* at 1-3].

Respondent claimed the original confidential nature of the disciplinary proceedings prevented him from communicating with potential witnesses. In the interest of giving Respondent every opportunity to present evidence, he was allowed additional time to submit declarations from said witnesses after the hearing.[15] Respondent's post-hearing submissions, including his "late" submissions, have been accepted and fully considered.

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15 Allowing Respondent an opportunity to submit additional information, does not indicate Respondent was hampered by the initial confidentiality [*53] of the proceeding. As Respondent was informed, he could by agreement or through cooperation obtain affidavits or attendance from any necessary and material witness [Doc. 29 at 5]. Respondent did provide at the hearing a declaration of Hunt after his request to depose disciplinary counsel was denied. In addition, when Respondent initially relied upon the confidentiality provision of Local Rule 83.7 to claim he could not obey the court's order to notify judicial officers of this court of his disciplinary proceeding [Doc. 3], the court clearly responded that Local Rule 83.7 does not dictate confidentiality of the basic existence of the proceedings [Doc. 6 at 4

Respondent submitted notices of declarations [Doc. 35 & 59] with the declarations of the following: an English professor who also holds a J.D. degree and is alleged to be a linguistic expert, Bethany Dumas ("Dumas") [Doc. 36]; an attorney formerly engaged in the practice of law with Respondent who is alleged to be an expert on the Rules of Professional Conduct, Ann Short-Bowers ("Short-Bowers") [Doc. 37]; and several attorneys who were not present at the November 2006 hearing but read the transcript, including Wade Davies ("Davies") [Doc. 38], Henry Martin ("Martin") [Doc. 39], Caryll Alpert ("Alpert") [Doc. 40], Donald Dawson ("Dawson") [Doc. 41 (unsigned) & Doc. 64 (signed)], Randall Reagan ("Reagan") [Doc. 42],William Massey ("Massey") [Doc. 43], Mark Stephens ("Stephens") [Doc. 44], Jim Owen ("Owen") [Doc. 45], Julia Auer ("Auer") [Doc. 46], Nathaniel Evans ("Evans") [Doc. 47], John Halstead ("Halstead") [Doc. 48], Jhasta Moore ("Moore") [Doc. 49], David Skidmore ("Skidmore") [Doc. 50], Mike Whalen ("Whalen") [Doc. 51], David Wigler ("Wigler") [Doc. 52], Ursula Bailey ("Bailey") [Doc. 53], Stephen Burroughs ("Burroughs") [Doc. 54], F. D. Gibson III ("Gibson") [Doc. 55], Gregory Isaacs ("Isaacs") [Doc. 62], and Stephen Johnson ("Johnson")[Doc. 63] (collectively the "declarations" or "declarants") [16]. Based upon their review of the

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n.4]. As previously noted, Respondent provided the waiver required to open the confidential proceedings on the first day of the hearing--after Respondent's attempts to continue, delay and/or stay the proceedings failed.

16 Attorneys Johnson, Reagan, Alpert, and Davies participated in the filing of the amicus brief in the contempt proceedings in which the TACDL argued Respondent's conduct was a good faith effort to represent his client and comported with the constitutional and ethical mandates of a criminal defense lawyer in an adversarial system of justice and urged the court not to hold Respondent in contempt. Attorneys Martin, the Federal Defender for the Middle District of Tennessee, and Alpert, an assistant federal defender in that office, are also active in the TACDL. Attorney Dawson in the Post-Conviction Defender for the State of Tennessee and a member of TACDL. Attorneys Stephens is the District Public Defender for the Sixth Judicial Circuit (Knox County) and active in the TACDL and attorneys Owen, Auer, Evans, Halstead, Moore, and Skidmoore are assistant public defenders in that office. Attorneys Whalen, Burroughs, Isaacs, and Gibson have known Respondent and/or followed his career for years and at least Gibson, Whalen, and Isaacs

November 2006 transcript and various pleadings and upon their varying degrees of work with and knowledge of Respondent, each declarant, in spite of the criminal contempt conviction to the contrary, generally and consistently with TACDL's position, advocates that Respondent did not violate any rules of conduct or ethical obligations and instead merely engaged in zealous representation. Some declarants add that if the court holds otherwise, then they believe Respondent did not intentionally engage in inappropriate conduct and was solely motivated by his duty to engage in zealous representation. None of these declarants was at the November 2006 hearing; as noted, they base their declarations on a review of the transcript and various pleadings in this matter along with their knowledge and observation of Respondent over the years and, in some cases, since the events of November 2006.

In addition, Respondent submitted his own declarations of "other instances" [Doc. 56 & 60], of apologies [Doc. 57], and of anticipation of Vassar's response [Doc. 58]. In his written apology, Respondent sates:

> I reiterate what I said from the time I was taken into custody and that is, I deeply regret and apologize that my actions were considered by District Judge Greer to be a violation of his orders and that now, my actions have been considered by Senior [sic] District Judge Collier to be violations of the Rules of Professional Conduct.

[Doc. 57 at 3, P 7].

All of the Respondent's evidence and arguments have been carefully reviewed and fully considered.

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are active in TACDL. Attorneys Short-Bowers, Wigler, and Bailey were formerly or are currently associated with Respondent's self-described "one-man" criminal law practice and Short-Bowers is also another former president of TACDL. Along with Respondent, some of the attorneys are also active members of the Tennessee Bar Association's criminal law section and/or other organizations such as the National Association of Criminal Defense Attorneys.

V. Analysis

Federal Rule of Civil Procedure 83 provides each district court may make and amend local rules governing its practice. Pursuant to the provisions of Rule 83, this court has promulgated Local Rule 83.7, which allows the court to impose discipline on any member of its bar who has violated the Rules of Professional Conduct or has engaged in unethical conduct tending to bring the court or the bar into disrepute.

As noted herein, the Show Cause Order was issued pursuant to Local Rule 83.7(a), which provides, in pertinent part:

> [t]he court may impose discipline on any member of its bar who has violated the Rules of Professional Conduct as adopted by the Supreme Court of Tennessee, or who has engaged in unethical conduct tending to bring the court or the bar into disrepute. . . . Discipline which may be imposed includes disbarment, suspension, reprimand, or such other further disciplinary action as the court may deem appropriate and just. Nothing in this rule shall be construed as limiting in any way the exercise by the court of its inherent contempt power or its authority to impose other sanctions provided under federal law and the *Federal Rules of Civil Procedure.*

E.D. TN. LR 83.7(a).

In *Chambers v. NASCO, Inc.*, 501 U.S. 32, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991), the Supreme Court stated:

> It has long been understood that certain implied powers must necessarily result to our Courts of justice from the nature of their institution, powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others. For this reason, Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful

> mandates. These powers are governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.
>
> Prior cases have outlined the scope of the inherent power of the federal courts. For example, the Court has held that a federal court has the power to control admission to its bar and to discipline attorneys who appear before it.

Id. at 43 (internal quotation marks and citations omitted). *See also In re Lewellen,* 56 F. App'x 663 (6th Cir. 2003) (application of local rule of district court to censure attorney upheld).

Thus, it is well established a court "has inherent power and responsibility to supervise the conduct of attorneys who are admitted to practice before it." *Matter of Searer,* 950 F. Supp. 811, 813 (W.D. Mich 1996) (McKeague, J.). The Sixth Circuit has acknowledged courts must have the power to impose submission to their lawful mandates, and respect and decorum in their presence. *See In re Smothers,* 322 F.3d 438, 442 (6th Cir. 2003) (suggests disciplinary action and penalties, other than criminal contempt, for certain conduct of attorneys that falls below the expected standards of members of the bar). The nature and purpose of disciplinary proceedings were succinctly set forth in *Searer* as follows:

> The nature of a disciplinary proceeding is neither civil nor criminal, but an investigation [*60] into the conduct of the lawyer-respondent. The purpose of a disciplinary proceeding is not to punish, but rather to determine whether misconduct implicates fitness to continue to function as an officer of the Court. The real question at issue is the public interest and an attorney's right to continue to practice a profession imbued with public trust. The Court must thus consider both the fitness of one of its officers and the need to protect the public from an unqualified or unscrupulous practitioner. Because "deterioration in civility" is of epidemic proportions in the legal

> profession, the Court must be vigilant to safeguard public trust in the judicial system.
>
> In the federal system there is no uniform procedure for disciplinary proceedings. The individual judicial districts are free to define the rules to be followed and the grounds for punishment. At a minimum, however, an attorney subject to discipline is entitled to procedural due process, including notice and an opportunity to be heard. The district courts have various sanctions they can impose for unethical behavior, including monetary sanctions, contempt, disqualification of counsel, suspension, and disbarment.

950 F. Supp. at 813 (internal citations omitted).

As noted above, an attorney is entitled to procedural due process in disciplinary proceedings. *Id.; In re Ruffalo,* 390 U.S. 544, 550, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968). Respondent received such due process, including notice and an opportunity to be heard.

A. Referred Matters

Pursuant to its inherent power and responsibility to supervise the conduct of the attorneys admitted to practice in the court, the referral order issued by the court states:

> determine whether a hearing is warranted. *If a hearing is warranted the hearing shall be limited to a demonstration by Respondent that the allegations in the Show Cause Order are inaccurate, or if accurate, that disciplinary action is not warranted.*

[Doc. 7 at 2] (emphasis added).

B. Are the Allegations in the Show Cause Order Inaccurate?

Per the referral of this matter pursuant to Local Rule 83.7, I have reviewed and considered all documents filed in this matter and the testimony, exhibits, and argument presented at the March

5-6 hearing. The allegations of the Show Cause Order are based upon the conduct reflected in the transcript of the November 2006 hearing. Respondent essentially argues the transcript is an insufficient basis for establishing his conduct. In support of this argument, he submits the declaration of Dumas, an alleged expert linguist, who states, in pertinent part:

> 6. Opinions such as those expressed by Judge Collier have degrees of accuracy depending on the source of the opinions expressed. The most accurate source would be the parties to the communication; next would be a person present witnessing the communication reflected in the transcript; next would be an audio-video of the communication; then an audio of the communication; then a transcript of the communication; and last a person's memory of the communication without a transcript.
>
> 7. It is my opinion that the persons who were participants in the communication on November 17th are in the best position to offer opinions such as those expressed by Judge Collier. In this case, it is my opinion that the opinions of District Judge Greer and Mr. Moncier should control. . . .

[Doc. 36 at 2].[17]

For decades, courts have accepted transcripts as evidence and given them the weight they are entitled to in various proceedings from motions practice to jury trials. I will likewise rely upon the transcript for this disciplinary proceeding. I have also reviewed Judge Greer's ruling regarding Respondent's conduct at the November 2006 hearing in *Moncier,* 2007 U.S. Dist. LEXIS 39206, 2007 WL 1577718, and the ruling addressing Respondent's motion to disqualify in the criminal contempt proceeding, *United States v. Moncier,* 2007 U.S. Dist. LEXIS

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17 Dumas then goes on to analyze the "cold transcript" as do all of the other declarants.

30241, 2007 WL 1206731 ("*Moncier* Disqualification Ruling").[18]

[16] As was found in the *Moncier* Disqualification Ruling, the transcript provides relevant evidence to either prove or disprove the conduct at issue. In addition, I have considered Respondent's testimony and submissions concerning his conduct.

While Respondent disputes his conduct warrants discipline, he does not dispute the accuracy of the transcript other than to indicate some of the "dashes" in the transcript may not reflect actual interruptions. Respondent also attempts to justify his interruptions and he questions the number of times he interrupted, but he does not deny he interrupted the court several times. The allegation Respondent repeatedly interrupted the court is established in the transcript. For example, just prior to being taken into custody, and despite being ordered first to be quiet and then, after another interruption, being ordered to not say another word, Respondent interrupted again.

The allegation that Respondent accused the prosecution of engaging in a conspiracy to prevent him from trying cases due to his success in past trials is proven by the transcript. During the course of a lengthy discussion with the court, Respondent clearly stated the prosecutors "don't like me. I have no personal animosity toward them, but they don't want people to hire me to try jury trials." (Tr. 39). Respondent also stated, "what's going on here is that I think that the government is trying to set me up." (Tr. 49). Respondent continued stating, "[s]o what's really going on here, I think, is that because I have tried a number of cases successfully, including this case, because I have the reputation of trying cases against the government and not doing what they want in this community, they're coming after me. That's what I think is going on. . . ." (Tr. 49-50). Respondent's "explanation" at the March 5-6 hearing, that he only meant the government

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[18] Respondent's insistence that either Judge Greer or Chief Judge Collier must be a "complainant" under the local rule and must appear to testify against him subject to cross examination concerning his conduct is misplaced. Local Rule 83.7(b) provides for institution of proceedings by the court on its own initiative without the requirement of a complaint or complainant, as happened here. As previously ruled [Doc. 12 at 3-4], judges speak through their orders. Respondent has not supported his request to cross examine either judge with any authority.

engaged in "concerted action" against him--not necessarily a conspiracy -- does not demonstrate the allegation is inaccurate. Nor does Respondent explain how an accusation that the government engaged in "a concerted effort" against him is significantly different from a claim that prosecutors conspired against him.

The allegation Respondent threatened to "sit there and remain moot," *i.e.,* not provide a defense for his client, due to a potential conflict Respondent perceived is again proven in the transcript (Tr. 41-42). Respondent admits making the statement and even acknowledges it was a poor choice of words. Thus, the allegation is accurate.

The allegation Respondent represented to the court Vassar could not speak candidly or fully with him because of his representation of an uncharged co-conspirator is also supported by any reading of the transcript (Tr. 43). Again, Respondent admits making the statement.

Likewise, the allegation that, despite the representations of a conflict, Respondent later in the hearing represented to the court he had "absolutely" no reason to believe he had a conflict of interest in representing Vassar is again demonstrated in the transcript (Tr. 87-88). Respondent asserts he was referring only to a potential conflict of interest, and he does not dispute he made the statements at issue.

The allegation Respondent responded to the court's admonishment by contradicting it is again supported by the transcript (Tr. 90-96). Respondent denies the characterization of his response as a contradiction, but he does not deny the transcript accurately reflects what he said in response to the court.

The transcript reflects that despite being ordered first to be quiet and then to not say another word and after being warned of the consequences of such action, Respondent interrupted again in direct violation of the court's order. Respondent claims he was only attempting to clarify the order to determine if he could speak to Vassar, but he admits the dialogue took place as reflected in the transcript.

While the conduct that occurred is not seriously disputed, the conclusions to be drawn from Respondent's conduct are hotly contested. Respondent continues to defend his conduct as being merely zealous and legitimate advocacy on behalf of his client or as being otherwise appropriate in the context of the hearing. In this proceeding, Respondent advocates his conduct was "goaded" by wrongful conduct of the prosecution team" [Doc. 13 at 26], at the same time he maintains his conduct was completely proper zealous representation. Respondent disputes his conduct constituted a violation of an order of the court, abuse of the court, disrespect for the court, contemptuous behavior directed at the court, interference and needless prolongation of the proceeding before the court, and obstructive behavior. He likewise argues his conduct does not raise questions about his fitness to practice before the court or remain a member of the bar of the court. Respondent argues his conduct did not violate the Rules of Professional Conduct or tend to bring the court or bar into disrepute because he was simply meeting his ethical duty to his client.

As noted, Respondent also argues the court should refrain from making any disciplinary ruling because his appeal to the Sixth Circuit (concerning the court's final order of criminal contempt under 18 U.S.C. §§ 401(1) & 401(3) against him) has potential collateral estoppel or *res judicata* effects, which are defenses he has affirmatively asserted [Doc. 20 & 26].[19] Respondent also asserts the affirmative defenses of double jeopardy, statute of limitations, and laches, without providing legal support or argument or suggesting how such affirmative

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19 "*Res judicata* has both a general and a specific meaning. I[n] its general sense, it refers to the preclusive effects of former proceedings. This broad category is divided into two more specific doctrines: *res judicata* in its narrow sense, and collateral estoppel. *Res judicata* in its narrow sense refers to claim preclusion. Collateral estoppel refers to issue preclusion." *Booker v. City of Beachwood*, No. 1:06-CV-315, 2007 U.S. Dist. LEXIS 24773, 2007 WL 1039155, * 3 (N.D.Ohio Apr. 3, 2007); *accord, DLX, Inc. v. Kentucky*, 381 F.3d 511, 521 (6th Cir. 2004). This [*69] Court has recognized the use of the terms "*res judicata*" and "collateral estoppel" are disfavored in federal court where the terms "issue preclusion" and "claim preclusion" are favored. *Tate v. Wenger*, No. 1:04-cv-379, 2006 U.S. Dist. LEXIS 37253, 2006 WL 1582422, * 8 n.9 (E.D. Tenn. June 6, 2006) (citing *DLX*, 381 F.3d at 521 n.5).

defenses impact these proceedings to Respondent's benefit.[20] " The preclusive effects of Respondent's criminal contempt proceedings will be addressed herein.

1. The Effect of the Criminal Contempt Judgment in Moncier

Title 18 U.S.C. ß 401 regarding criminal contempt states in pertinent part:

> A court of the United States shall have power to punish . . . such contempt of its authority, and none other, as - -
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> . . .
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

In order to support a conviction for criminal contempt under § 401(1), the record must establish beyond a reasonable doubt the following four elements:

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20 The Fifth Amendment provides that a person shall not be "subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The double jeopardy provision of the Fifth Amendment bars successive prosecutions and also bars the government from "punishing twice, or attempting a second time to punish *criminally,* for the same offense." *Herbert v. Billy,* 160 F.3d 1131, 1136 (6th Cir. 1998) (quoting *Witte v. United States,* 515 U.S. 389, 396, 115 S. Ct. 2199, 132 L. Ed. 2d 351 (1995) (quoting *Helvering v. Mitchell,* 303 U.S. 391, 399, 58 S. Ct. 630, 82 L. Ed. 917, 1938-1 C.B. 317 (1938)) (emphasis added). *See also Ball v. United States,* 163 U.S. 662, 669, 16 S. Ct. 1192, 41 L. Ed. 300 (1896) (defendant had been tried and acquitted prior to being improperly subjected to a second trial). As noted in *Searer,* a disciplinary proceeding is not a criminal proceeding. 950 F. Supp. at 813. Respondent has made no claims regarding what statute of limitations he contends applies or how laches is at issue. As Respondent has failed to explain how double jeopardy, laches or an unspecified statute of limitations would have any bearing on this disciplinary proceeding, his conclusory invocation of these defenses will not be considered further herein.

> First, there must be evidence that the defendant engaged in some conduct that can be considered "misbehavior." *See Vaughn v. City of Flint,* 752 F.2d 1160, 1167 (6th Cir. 1985). Second, that misbehavior must amount to an "obstruction of the administration of justice," *see id.,* an obstruction that "must be ... actual, not ... [*71] theoretical...." *See id.* at 1168 (citing *In re McConnell,* 370 U.S. 230, 234, 82 S.Ct. 1288, 8 L.Ed.2d 434 (1962)). Third, the contempt must occur in the presence of the judge imposing the summary determination of criminal guilt. *See id.* at 1167. Finally, the defendant must have formed an actual intent to cause the obstruction of justice. *See Id.* Thus, the improper act must be "a deliberate or intended violation, as distinguished from an accidental, inadvertent or negligent violation." *Id.* at 1169 (quoting *TWM Manufacturing Company v. Dura Corp.,* 722 F.2d 1261, 1272 (6th Cir.1983)).

Moncier, 2007 U.S. Dist. LEXIS 39206, 2007 WL 1577718 at * 2.

In order to support a conviction for criminal contempt under 18 U.S.C. § 401(3), proof beyond a reasonable doubt is required of:

> (1) resistence or disobedience to the court's "writ, process, order, rule or command," and (2) the act of resistence or disobedience must be "a deliberate or intended violation, as distinguished from an accidental, inadvertent or negligent violation." *In re Chandler,* 906 F.2d 248, 250 (6th Cir.1990) (quoting *TMW Manufacturing Company,* 722 F.2d at 1272). The second requirement may be "inferred if a lawyer's conduct discloses a reckless disregard for his [*72] professional duty." *U.S. v. Delahanty,* 488 F.2d 396, 398 (6th Cir.1973).

2007 U.S. Dist. LEXIS 39206 [WL] at * 3.

A "[f]inal judgment in a criminal case . . . means sentence. The sentence is the judgment." *United States v. Jolivette*, 257 F.3d 581, 583 (6th Cir. 2001) (quoting *Corey v. United States*, 375 U.S. 169, 174, 84 S. Ct. 298, 11 L. Ed. 2d 229 (1963)); *accord, Massengale v. United States*, 278 F.2d 344, 345 (6th Cir. 1960). A final judgment of criminal contempt has been entered against Respondent and it is that final judgment he is now appealing.

With respect to Respondent's claim that these disciplinary proceedings should be stayed pending his appeal of his criminal contempt conviction, both the Sixth Circuit and this court have rejected his claim as previously noted herein.

The issue that remains given the denial of Respondent's various motions to delay, stay or prevent these proceedings is what effect does the judgment of criminal contempt have in these disciplinary proceedings pending appeal. As stated by a district court in a case involving an expedited direct appeal of a criminal conviction to the Sixth Circuit:

> A criminal conviction and sentence is a final judgment on the merits. *See, e.g., United States v. Jolivette*, 257 F.3d 581, 583 (6th Cir. 2001). Defendants argue that because they have an expedited appeal pending before the Sixth Circuit, this Court should either exercise its discretion not to apply estoppel or stay its decision on the SEC's Motion until after the appeals process is complete. As a preliminary matter, the Court notes that the Sixth Circuit, in placing Defendants' appeal on the expedited schedule, commented that the Defendants had not raised a substantial appellate issue. Moreover, the weight of the authority rejects Defendants' recommended approach. The majority of courts have concluded that a pending criminal appeal does not bar the court from applying principles of claim preclusion to the plaintiff's case. *See Smith*, 129 F.3d at 362 (noting that the pendency

> of an appeal does not preclude a judgment's *res judicata* effect); *Namer,* 2004 U.S. Dist. LEXIS 19611, 2004 WL 2199471 at * 8 ("But the fact that [defendant's] criminal conviction is currently under consideration by the United States Court of Appeals for the Sixth Circuit does not foreclose the prior judgment from having preclusive effect."); *SEC v. Pace,* 173 F. Supp. 2d 30, 33 (D.D.C. 2001) ("The fact that Pace's appeal from his conviction is still pending does not affect the application of collateral estoppel."); *United States v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., AFL-CIO,* 905 F.2d 610, 621 (2d Cir. 1990) ("The pendency of a criminal appeal generally 'does not deprive a judgment of its preclusive effect.'") (citations omitted).
>
> Allowing Defendants to avoid the preclusive effect of the Criminal Action until their appeal is finalized would halt the process of justice. Defendants have the ability to delay their criminal appeals . . .by requesting en banc hearings, petitioning the U.S. Supreme Court for certiorari . . .

U.S. S.E.C. v. Blackwell, 477 F. Supp. 2d 891, 900-01 (S.D. Ohio 2007).

In general, where the following four elements have been satisfied, a decision of a federal court is entitled to collateral estoppel effect:

> (1) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding; (2) determination of the issue must have been necessary to the outcome of the prior proceeding; (3) the prior proceeding must have resulted in a final judgment on the merits; and (4) the party against whom estoppel is sought must have

> had a full and fair opportunity to litigate the issue in the prior proceeding.

Smith v. SEC, 129 F.3d 356, 362 (6th Cir. 1997) (quoting *Detroit Police Officers Ass'n v. Young,* 824 F.2d 512, 515 (6th Cir. 1987)). The Sixth Circuit in *Smith* also held a pending appeal of the judgment does not deprive the judgment of its *res judicata* effect. *Id.* at 363 n.7.

As applicable to criminal contempt, in *S.E.C. v. Namer,* No. 97 Civ.2085 (PKC), 2004 U.S. Dist. LEXIS 19611, 2004 WL 2199471 (S.D.N.Y. Sept. 30, 2004), the court held "[f]ederal criminal convictions have a collateral estoppel effect in federal civil actions under a four-part test '(1) the issues in both proceedings must be identical, (2) the issue in the prior proceeding must have been actually litigated and actually decided, (3) there must have been a full and fair opportunity for litigation in the prior proceeding, and (4) the issue previously litigated must have been necessary to support a valid and final judgment on the merits.'" 2004 U.S. Dist. LEXIS 19611 [WL] at * 4 (quoting *Gelb v. Royal Globe Ins. Co.,* 798 F.2d 38, 44 (2d Cir.1986)).

In *May v. Oldfield,* 698 F. Supp. 124 (E.D.Ky. 1988), the court held:

> "[t]he established rule in the federal courts is that a final judgment retains all of its *res judicata* consequences pending decision of the appeal. . . ." Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* Section 4433 at p. 308. This established rule applies equally well to the appeal of a prior criminal conviction. *Webb v. Voirol,* 773 F.2d 208, 211 (8th Cir.1985). "[C]ourts have repeatedly held that the pendency of an appeal does not destroy the finality of a judgment for the purpose of applying the doctrine of collateral estoppel." *Id.*

Id. at 127.

In an unpublished, and therefore nonbinding, decision,[21] the Sixth Circuit has recognized that while a judgment on appeal retains its preclusive effects pending appeal, it is subject to reversal and therefore might be difficult to rely upon, stating:

> a final judgment retains its issue-preclusive effects pending decision of the appeal. *See, e.g., Commodities Export Co. v. United States Custom Serv.*, 957 F.2d 223, 228 (6th Cir.1992); 18 Charles Alan Wright, Arthur R. Miller, And Edward H. Cooper, *Federal Practice And Procedure* § 4433, at 308 (1981). Nevertheless, we recognize the difficulty in relying upon the collateral estoppel effects of a judgment that may be reversed on appeal. *See, e.g., Erebia v. Chrysler Plastic Prods. Corp.*, 891 F.2d 1212, 1214 (6th Cir.1989) [*77] ("A judgment that has been vacated, reversed, or set aside on appeal is thereby deprived of all conclusive effect, both as *res judicata* and as collateral estoppel.").

Isibor v. City of Franklin, No. 97-5729, 1998 U.S. App. LEXIS 10766, 1998 WL 344078, * 5 (6th Cir. 1998).

Local Rule 83.7(h)(4) states a judgment of conviction for a criminal offense entered in federal court shall be considered clear and convincing evidence[22] » which also indicates the judgment has preclusive effect in this disciplinary proceeding under the applicable local rule. Of course, suspension or disbarment from the bar of the court are not measures the court may take to

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21 *United States v. Sanford*, 476 F.3d 391, 396 (6th Cir. 2007); 6th Cir. Rule 206(c).

22 Clear and convincing evidence must "produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established." *Tennessee Consol. Coal Co. v. Floyd*, 44 F. App'x 663, 667 (6th Cir. 2002) (quoting *Fruge v. Doe*, 952 S.W.2d 408, 412 n.2 (Tenn .1997)). "Clear and convincing evidence means that there can be no serious doubt about the correctness of the conclusions drawn from the evidence" *Cassidy v. Spectrum Rents*, 959 F. Supp. 823, 825 (E.D. Tenn.1997) (citing *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901, n.3. (Tenn.1992)).

address criminal contempt. In criminal contempt proceedings, a judge is limited to the sanctions prescribed in 18 U.S.C. ß 401, which do not include the power to strip an attorney of his ability to practice. Likewise, this court is not required or obliged to suspend, disbar, or even reprimand an attorney pursuant to Local Rule 83.7 for contempt of court. In summary, the power and decision to discipline an attorney under Local Rule 83.7 is greatly removed from the authority of a trial judge to [*78] address criminal contempt, and it is proper to apply Local Rule 83.7 with respect to determining whether disciplinary action should be undertaken in this case. Any difficulty in relying on the preclusive effect of the criminal contempt judgment pending appeal may be considered as appropriate in this disciplinary process.

I conclude the decision in *Moncier,* 2007 U.S. Dist. LEXIS 39206, 2007 WL 1577718, retains its preclusive effect pending appeal and that preclusion is appropriate for those issues raised and litigated in the prior contempt proceeding, *i.e.,* obstruction of justice and violation of the court's order, under the four-part test set forth above. Determinations about Respondent's obstruction of justice and violation of the court's order were necessary to the outcome of the prior contempt proceeding and Respondent had a full and fair opportunity to litigate those issues in the prior contempt proceeding. The purpose of this disciplinary proceeding is not to relitigate the merits of the criminal contempt charge; that has already been litigated. Thus, it is proper to invoke the doctrine of preclusion as it relates to this matter with respect to the issues determined in the criminal contempt proceeding.

2. Ethical and Professional Conduct Considerations

The Rules of Professional Conduct expressly do not "exhaust the moral and ethical considerations that should inform a lawyer," they "simply provide a framework for the ethical practice of law." Tenn. Sup. R. 8, Scope (2). Rules applicable to

this matter include, at least, Tenn. Sup. R. 8, RPC 3.5(e) and 8.4.[23] Rule 3.5(e) states:

> **Impartiality and Decorum of the Tribunal.** - A lawyer shall not:
>
> (e) Engage in conduct intended to disrupt a proceeding before or conducted pursuant to the authority of a tribunal. . . .

Commentary 5 to Rule 3.5 notes "[r]efraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants." Rule 8.4(d) states:

> **Misconduct.** - It is professional misconduct for a lawyer to:
>
> (d) Engage in conduct that is prejudicial to the administration of justice. . . .

Commentary 8 to Rule 8.4 states:

> [8] In both their professional and personal activities, lawyers have special obligations to demonstrate respect for the law and legal institutions. Normally, a lawyer who knowingly fails to obey a court order demonstrates a disrespect for the law that is prejudicial to the administration of justice. Failure to comply with a court order is not a disciplinary offense, however, when it does not evidence disrespect for the law either because the lawyer is unable to comply with the order or the lawyer is seeking in good faith to determine the validity, scope, meaning, or application of the law upon which the order is based.

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[23] Under The Code of Conduct for United States Judges, Canon 3(A)(2), which governs judicial conduct and certain duties of a judge with respect to adjudications, a judge should maintain order and decorum in proceedings before the judge. *Code of Conduct for United States Judges*, 175 F.R.D. 363, 367 (1998). Under Canon 3(A)(3) a judge should require appropriate conduct of the attorneys. *Id.*

Guidance concerning conduct that may hold the bar or court is disrepute may be found in *In re Snyder*, 472 U.S. 634, 105 S. Ct. 2874, 86 L. Ed. 2d 504 (1985), where the Supreme Court addressed "conduct unbecoming a member of the bar" as:

> The phrase "conduct unbecoming a member of the bar" must be read in light of the "complex code of behavior" to which attorneys are subject. Essentially, this reflects the burdens inherent in the attorney's dual obligations to clients and to the system of justice. Justice Cardozo once observed:
>
> > "'Membership in the bar is a privilege burdened with conditions.' [An attorney is] received into that ancient fellowship for something more than private gain. He [becomes] an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice."
>
> As an officer of the court, a member of the bar enjoys singular powers that others do not possess; by virtue of admission, members of the bar share a kind of monopoly granted only to lawyers. Admission creates a license not only to advise and counsel clients but to appear in court and try cases; as an officer of the court, a lawyer can cause persons to drop their private affairs and be called as witnesses in court, and for depositions and other pretrial processes that, while subject to the ultimate control of the court, may be conducted outside courtrooms. The license granted by the court requires members of the bar to conduct themselves in a manner compatible with the role of courts in the administration of justice.
>
> Read in light of the traditional duties imposed on an attorney, it is clear that "conduct unbecoming a member of the bar" is conduct contrary to

> professional standards that shows an unfitness to discharge continuing obligations to clients or the courts, or conduct inimical to the administration of justice. More specific guidance is provided by case law, applicable court rules, and "the lore of the profession," as embodied in codes of professional conduct.

Id. at 644-45 (internal citations omitted).

As a member of a regulated profession and as an officer of the court, Respondent "belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards." *In re Sawyer,* 360 U.S. 622, 646, 79 S. Ct. 1376, 3 L. Ed. 2d 1473 (1959) (Stewart, J., concurring). Without question, Respondent did have both the right and the duty to zealously defend his client, and no less is expected or accepted by the court. Respondent, however, does not have the right to overstep his ethical bounds under the guise of zealous representation.

As stated in *Sacher v. United States,* 343 U.S. 1, 9, 72 S. Ct. 451, 96 L. Ed. 717 (1952):

> Of course, it is the right of counsel for every litigant to press his claim, even if it appears farfetched and untenable, to obtain the court's considered ruling. Full enjoyment of that right, with due allowance for the heat of controversy, will be protected by appellate courts when infringed by trial courts. But if the ruling is adverse, it is not counsel's right to resist it or to insult the judge - his right is only respectfully to preserve his point for appeal. During a trial, lawyers must speak, each in his own time and within his allowed time, and with relevance and moderation.

In *Ramsey v. Board of Professional Responsibility of Supreme Court of Tennessee,* 771 S.W.2d 116, 123 (Tenn. 1989), the Supreme Court of Tennessee found "that an attorney who

fails to abide by court orders and fails to respond to questions from the court while appearing before the court, and who slams courtroom doors during hearings has not only degraded that court, but acted in a manner prejudicial to the administration of justice." The Supreme Court of Tennessee has also held, "An attorney may not, by speech or other conduct, resist a ruling of the trial court beyond the point necessary to preserve a claim for appeal." *Board of Professional Responsibility of Supreme Court of Tennessee v. Slavin,* 145 S.W.3d 538, 549 (Tenn. 2004) (quoting *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1071, 111 S. Ct. 2720, 115 L. Ed. 2d 888 (1991)).

3. Respondent's Conduct

Although Respondent did not slam doors during the November 2006 hearing, he did fail to abide by the court's order to remain silent and he interrupted the court repeatedly. Respondent's attempts to explain and justify his conduct do not demonstrate the allegations are inaccurate. One of the most troubling aspects of Respondent's conduct is his disobedience of the court's order. Initially, Attorney Rogers represented the violation of the court's order occurred because Respondent felt compelled to make an objection.[24] Perhaps recognizing he had already objected, Respondent testified in the disciplinary proceedings that he spoke because he was seeking clarification and because he thought Vassar was attempting to communicate with him. The court in *Moncier* has already rejected Respondent's various explanations for his conduct in violating the court's order. 2007 U.S. Dist. LEXIS 39206, 2007 WL 1577718 at * 6. In rejecting such claims in the criminal contempt proceedings, the court held:

> Moncier has asserted through his testimony at trial and in an affidavit filed in support of his pre-trial motion to dismiss that the Court had no right to

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[24] Attorney Rogers reported to the court that Respondent had expressed he was only trying to make an objection, he intended no disrespect, and he was sorry that by attempting to utter his statement he violated the court's order, but he felt he was compelled to do so (Exh. 1 at Tab 1 at 110-11; Exh. 3 at 110-11).

> question his client (i.e. that Rule 44 did not permit the Court's questions), that he had no idea why the Court was asking the questions (except possibly to "clean up the record") and that his client had communicated to him through eye contact and body language that he wished to talk to him before answering the Court's questions. Such assertions by Moncier lack any credibility.

Id.[25] Likewise, Respondent's attempt to claim he was merely seeking clarification was rejected in his contempt proceedings. 2007 U.S. Dist. LEXIS 39206, [WL] at * 7, n.14.

The court in *Moncier* also thoroughly addressed Respondent's claims he merely engaged in zealous representation. 2007 U.S. Dist. LEXIS 39206, [WL] at * 3. After carefully balancing the two important considerations of counsel's duty of zealous representation with the court's duty to properly administer justice, the court found Respondent's conduct could not be excused or properly characterized as zealous representation. 2007 U.S. Dist. LEXIS 39206, [WL] at * 3-10. The court specifically found Respondent's conduct of again interrupting the court after a warning not to do so had a disruptive effect on the proceedings and resulted in a delay of those proceedings. 2007 U.S. Dist. LEXIS 39206, [WL] at * 5.

The court also specifically held Respondent's conduct could not be excused as the mistake of a young or inexperienced lawyer or an aberrant act given the Respondent's long history of trying cases where decisions were made quickly and without the opportunity for extensive forethought. 2007 U.S. Dist. LEXIS 39206, [WL] at * 3. The court noted that it had admonished Respondent for a wide range of misconduct, had lectured him concerning professionalism and civility, and had threatened him with a finding of contempt on prior occasions. 2007 U.S. Dist.

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25 Respondent in this proceeding also relies upon a claim by Vassar that Vassar was "looking at [Respondent] trying to get [Respondent] to speak with [him] about what Judge Greer was . . . trying to do" [Exh. 7 at 2, P 34]. In the criminal contempt proceedings, however, the court specifically found Vassar made no request to speak with Respondent. *Moncier*, 2007 U.S. Dist. LEXIS 39206, 2007 WL 1577718 at * 6 n.8.

LEXIS 39206, [WL] at * 4. The court concluded in *Moncier* that Respondent's conduct should be viewed as the calculated and deliberate acts of a wily veteran. 2007 U.S. Dist. LEXIS 39206, [WL] at * 7. In adjudging Respondent to be guilty of criminal contempt under 18 U.S.C. §§ 401(1) & 401(3), the court found that Respondent intentionally committed misconduct in the presence of the court, which constituted an obstruction of justice, and also intentionally disobeyed an order of the court. In the *Moncier* Disqualification Ruling, the court also noted Respondent's behavior was disrespectful to the court as an institution, although disrespect for the judge was not a basis for the contempt proceedings. 2007 U.S. Dist. LEXIS 30241, 2007 WL 1206731 * 1-2.

Many of Respondent's efforts in this disciplinary proceeding amount to an attempt to relitigate the merits of his criminal contempt adjudication. A significant portion of the declarations reiterate the position contained in TACDL's amicus brief in the contempt proceedings.[26] While Respondent is not entitled to revisit his adjudicated guilt in this disciplinary proceeding, his evidence has been considered as it relates to an explanation or mitigation of his actions.

I find, by clear and convincing evidence, Respondent's conduct, particularly in disobeying the direct commands to be quiet and to not speak another word under the circumstances of the November 2006 hearing, constitutes an abuse of the court, disrespect for the court, contemptuous behavior directed at the court, interference with and needless prolongation of the proceeding before the court, and obstructive behavior. I also conclude Respondent violated the aforementioned Rules of Professional Conduct during the hearing. In addition, the conduct was unbecoming an officer of the court and bro ght the court and bar into disrepute by, at a minimum, interrupting and being prejudicial to the orderly administration of justice.

Respondent has not demonstrated that the allegations of the Show Cause Order that he engaged in: (a) disruptive behavior

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26 The court rejected TACDL's position in the criminal contempt proceedings. *Moncier*, 2007 U.S. Dist. LEXIS 39206, 2007 WL 1577718 at * 7-8 & n.15.

during the November 2006 hearing; (b) disobedience of a direct order of the court during the hearing; and (c) unprofessional and unethical behavior that violates the Rules of Professional Conduct or brings the court or bar into disrepute during the hearing, are inaccurate. Therefore, in light of the clear and convincing evidence, I **RECOMMEND** that the court find Respondent has engaged in conduct subject to attorney discipline under Local Rule 83.7.

C. Is Discipline Warranted?

Conduct constituting criminal contempt during a hearing certainly raises questions about Respondent's fitness to practice before this court and remain a member of the bar of this court, but the conviction it is not determinative of this matter. Respondent was given great leeway to introduce evidence of the circumstances surrounding his conduct at the November 2006 hearing because it is proper to consider such evidence to determine an appropriate response to unprofessional conduct.

Respondent--like most, if not all, of the declarants--strenuously argues Respondent merely engaged in zealous advocacy, not professional misconduct. Respondent continues to contend his behavior was within the bounds of proper and zealous representation of a client, absent a few poorly chosen words. This may explain why Respondent has only apologized for the *results* of his conduct or for the way his conduct was *perceived*-but not for engaging in the conduct. Attorney Rogers' statement reflects that Respondent felt compelled to again object in spite of the court's directive that he remain silent and even though he had already noted his objection. Such behavior is entirely consistent with some of the declarants' observations about Respondent[27] and Respondent's statements about himself.[28]

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27 While the declarants claim any discipline could "chill" zealous advocacy among the criminal defense bar, some also assert opinions such as: "I recognize that Mr. Moncier found it unsettling to accept the court's position and continued to argue his case, ..." [Doc. 49 at 2, P5]; "He can certainly be relentless, which at times may appear to a court to be disrespectful, . . ." [Doc. 48 at 2, P 6]; "For someone whose reputation for bombast and ferocity provokes so much disapproval among the men and women of the bench, I submit to those esteemed judges that they only know a small part of Mr.

Perhaps Judge Greer said it best at the sentencing for Respondent's criminal contempt when he noted Respondent was simply unable to admit he made a mistake with respect to his conduct in court in November 2006 [*see* Doc. 57 and transcript referenced therein].

There is little precedent or guidance in the case law for attorney discipline, especially for conduct improperly claimed to be merely zealous. Judge McKeague, as a district court judge in an attorney disciplinary proceeding, held that the attorney's continuing insistence she should not be disciplined because she engaged in zealous representation of her client and did not intend to violate an ethics rule "bespeaks a stubborn, even cavalier, disregard of the surrounding circumstances and important purposes served by the rule." *Searer*, 950 F. Supp. at 815. Similarly, Respondent's testimony denotes a stubborn and cavalier attitude without any acceptance that his conduct was in violation of the court's order, was unbecoming an officer of the court, or was in any way improper under Local Rule 83.7. As held in *Moncier*, "[z]ealous advocacy of a client's cause is never a legitimate excuse for disobeying a clear ruling of the court, and convicting an attorney of contempt for actual disobedience will not chill criminal defense attorneys from zealous advocacy within the bounds of the law." 2007 U.S. Dist. LEXIS 39206,

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Moncier's persona." [Doc. 46 at 3]; "There is no question that Mr. Moncier is relentless, uncompromising and persistent . . . ." [Doc. 44 at 4, P [*92] 9]; "[Zeal] should be encouraged. I recognize, however, that such a passion can be a two-edged sword. When coupled with the zeal demanded from the defense counsel in the justice system, it can sometimes drive a lawyer to the line-to the point of being over-zealous, to the point of making an error in judgment. The risk of such an error is at its peak when counsel is in the heat of the moment. The unfortunate circumstance in which Mr. Moncier now finds himself has the earmark of just such an error in judgment." [Doc. 43 at 2, PP 5-6].

28 Respondent's testimony, including his perceived reasons for his "strained relationships," indicates a certain pride in what was described as a style of advocacy that "pushes the envelope" in the contempt proceedings. Even the conflict of interest waiver form between Respondent and Vassar declares Respondent "has demonstrated he is not intimidated by the federal government, courts, or United States Attorneys" [Doc. 58-3 at 1].

2007 WL 1577718 at * 8 (quoting *In re Ellenbogen,* 315 U.S. App. D.C. 235, 72 F.3d 153 (D.C. Cir. 1995)).

As stated in *Searer* with respect to the purpose of the disciplinary proceedings:

> The purpose, again, is not to punish, but to seriously alert respondent to the importance of the public trust with which the practice of law is imbued, and the duty to discharge the privileges conferred thereby with conscientious care. We all make mistakes; virtue may be found in the manner in which we respond to them.

950 F. Supp. at 816. To date, Respondent does not recognize the inappropriateness of his conduct - conduct one declarant called a possible "error in judgment" and the court held was criminal contempt. Thus far, Respondent has failed to accept responsibility for more than a few poorly chosen words and perhaps an inability to effectively communicate during the November 2006 hearing. His refusal to recognize his conduct was inappropriate, unprofessional, unethical, and unbecoming an officer of the court calls into question whether Respondent is likely to correct his improper conduct without some form of meaningful discipline under Local Rule 83.7. Therefore, I **RECOMMEND** the court find Respondent has failed to show discipline is not warranted.

Although not specifically requested to make a recommendation regarding the type or nature of any discipline imposed by the court, I note that certain evidence presented in these proceedings pertains to the court's consideration of appropriate discipline in this case. This evidence may assist the court with respect to its consideration of appropriate discipline to alert Respondent "to the importance of the public trust with which the practice of law is imbued, and [his] duty to discharge the privileges conferred with conscientious care." *Id.*

Respondent has expressed remorse regarding the way his conduct was perceived and has stated he wishes, in retrospect, that he could have communicated better at the November 2006 hearing. While he advocates his conduct was not improper, he

also states he is not proud of the way he believes he is viewed by Judge Greer and that he has attempted to learn to communicate with the court better.

Perhaps indicating an ability to learn from this experience, Respondent's testimony and submissions also indicate he has appeared in several court proceedings without incident since November 2006, including appearances in this court. Respondent also conducted himself in an acceptable manner during the disciplinary hearing. The declarations submitted on behalf of Respondent also indicate he has governed himself in an appropriate manner while engaging in zealous representation in various court proceedings since the November 2006 hearing.[29] This evidence indicates Respondent is *capable* of conducting himself within the applicable ethical precepts and of engaging in zealous representations at the same time.

The declarations also indicate Respondent has been a willing mentor, trainer, and supporter to others engaged in criminal defense work. The declarants greatly admire Respondent's legal work and indicate Respondent is a hard working advocate who is willing to take on difficult cases and engage in *pro bono* work. The declarants also opine Respondent is a competent and able advocate as reflected in the results achieved for various clients in civil and criminal clients. Respondent also indicates his clients are dependent upon him for continuing zealous [*97] representation.[30]

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29 Respondent has had conflict over the years with various courts [*see e g*, Doc. 56 & *Moncier*], however, Respondent presented evidence he has not, at least thus far, been subjected to discipline by any court or Board of Professional Responsibility, other than a written reprimand from this court. With respect to the prior reprimand he received from this court, however, Respondent's testimony indicates he considers the reprimand somehow diminished because he did not receive a hearing with respect to the reprimand.

30 While not directly related to his fitness to practice before the court, Respondent does provide for at least one disabled son and he depends on his ability to practice law to do so. Based upon the summary of pending federal cases presented by Respondent during the hearing, Respondent represents clients in some 14 cases in this district and in six federal courts elsewhere [Exh. 8]. Respondent estimates he has a monetary interest in his contracts of

VI. Conclusion

For the reasons set for above, and based upon my investigation of the allegations in the Show Cause Order and the Show Cause Response, I **RECOMMEND** the court impose appropriate discipline for Respondent's conduct during the November 2006 hearing.

Any exceptions to this report and recommendation must be served and filed within ten (10) days from the date of service of this recommended disposition. Such exceptions must conform to the requirements of Local Rule 83.7(i)(2).

/s/ Susan K. Lee

SUSAN K. LEE

UNITED STATES MAGISTRATE JUDGE

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employment with clients in these federal court cases in excess of one million dollars [Doc. 16 at 1].

In re: HERBERT S. MONCIER, ESQ., BPR No. 1910

Case No. 1:08-MC-9

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

550 F. Supp. 2d 768; 2008 U.S. Dist. LEXIS 53546

April 29, 2008, Entered

SUBSEQUENT HISTORY: Later proceeding at In re Moncier, 569 F. Supp. 2d 725, 2008 U.S. Dist. LEXIS 64924 (E.D. Tenn., 2008)
Affirmed by In re Moncier, 2009 U.S. App. LEXIS 15093 (6th Cir.) (6th Cir. Tenn., 2009)

PRIOR HISTORY: In re Moncier, 2008 U.S. Dist. LEXIS 78458 (E.D. Tenn., Apr. 7, 2008)

COUNSEL: [**1] For Herbert Moncier, Respondent: Ralph E Harwell, LEAD ATTORNEY, Ralph E. Harwell, P.C., Knoxville, TN.

JUDGES: CURTIS L. COLLIER, CHIEF UNITED STATES DISTRICT JUDGE.

OPINION BY: CURTIS L. COLLIER

OPINION

[*769] **MEMORANDUM & ORDER**

One of the lesser-known responsibilities placed upon the federal courts is the task of admitting attorneys to practice before them and, when necessary, disciplining those attorneys. Each federal court must regulate the requirements and procedures for admission; the requirements and standards for attorneys already practicing before the court; and the procedures and determinations for those attorneys who fail to adhere to the standards of that federal court. These are among the administrative or management responsibilities of the court.

The federal courts do not rely solely upon the states to determine the fitness of an attorney for admission to practice law in federal courts. The federal courts do require an attorney who desires admission into a federal bar to be admitted first to a state bar. However, such an attorney must still apply separately to practice law in a federal court, because the federal courts have their own distinct requirements and standards for attorneys practicing before them. [**2] The federal courts also have their own requirements and standards which must be maintained for members to continue to practice in federal court. Thus, the requirements for admission and continued practice in federal and states courts are distinct. Indeed, many lawyers enjoy a long and successful career practicing in state court without ever setting foot in federal court; admission to a federal bar is not a necessity to practice law.

The federal requirements and standards are not necessarily higher or lower than those of a state bar, but rather reflect the different nature and circumstances of the federal and state courts. As one example, practice in federal courts is generally more specialized and more formal than practice in state courts, often due to the nature of the legal issues which are addressed in federal

courts. Additionally, a federal bar is made up of attorneys from all over the United States and its territories. This is certainly true in the Eastern District of Tennessee, where a large number of the attorneys that are members of the bar of this court are from not just Tennessee, but all across the country. Federal courts must establish their own standards of practice to [**3] create an effective, functional judicial system which involves attorneys practicing throughout the United States and its territories.

The existence and importance of varying standards and expectations in the federal courts is evident in the oath attorneys must pledge to become members of that federal bar. Attorneys admitted to federal court must take the following oath:

> I do solemnly swear, that to the best of my knowledge and ability, I will support and defend the Constitution of the United States against all enemies, foreign and domestic .... And, that I will demean myself as an attorney, proctor and solicitor of this Court, uprightly and according to law; so help me God.

Upon taking this oath and being approved for admission, attorneys become officers of the court.[31] At a minimum, this [*770] oath obligates attorneys admitted to the bar of a federal district court to demean themselves as an attorney uprightly and according to

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[31] The United States Supreme Court discussed the concept of "officer of the court" and the obligations that come with that designation in *In re Snyder*, 472 U.S. 634, 644-45, 105 S. Ct. 2874, 86 L. Ed. 2d 504 (1985). An attorney has a dual obligation to his or her clients and the system of justice. "The license [to practice law] granted by the court requires members of the bar to conduct themselves in a manner compatible with the role of courts in the administration of justice." *Id.*

law. Judges of the Eastern District of Tennessee are very proud that the great majority of attorneys admitted to practice law in this district do so in a highly professional and civil manner, demonstrating respect for the court, opposing counsel, the judicial system, and [**4] the parties involved in the judicial action. The judges of this district likewise treat the attorneys before them with dignity, respect, civility, and as professionals.

Unfortunately, the Court is now confronted with one of those rare instances where an attorney admitted to the bar of the Eastern District of Tennessee has failed to "demean [himself] as an attorney, proctor and solicitor of this Court, uprightly and according to law," as required by his oath; has engaged in unethical conduct tending to bring the court and the bar of the Eastern District of Tennessee into disrepute; and has engaged in professional misconduct of a nature that violated the Tennessee Rules of Professional Conduct as interpreted and applied by this Court.[32] *See Wolters Kluwer Fin. Servs. Inc. v. Scivantage,* 525 F. Supp. 2d 448, 449-50 (S.D.N.Y. 2007) [**5] ("From time to time, a lawyer's misconduct is so grave and so blatant as to demand more. When such lapses occur in the federal courts, it is not only our prerogative but our responsibility to address them and, where appropriate, impose sanctions. Indeed, as Canon 3B(3) of the Code of Conduct for U.S. Judges makes clear: 'A judge should initiate appropriate action when the judge becomes aware of reliable evidence indicating the likelihood of unprofessional conduct by a . . . lawyer.'") (footnotes omitted).

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[32] The Court gives considerable weight to the opinions of the Tennessee state courts in regards to the interpretation of the Tennessee Rules of Professional Conduct, but it is ultimately the responsibility of this Court and this Court alone to determine whether the Tennessee Rules of Professional Conduct were violated by Respondent such that he is subject to disciplinary action in this Court.

This case involves an attorney who refused to obey a court order, threatened to abandon a client during a court proceeding, and displayed disrespectful and contemptuous behavior towards the institutional role of the judge. The gravity of this attorney's misconduct is exacerbated by his inability [**6] to recognize and apologize for his wrongdoings, his frivolous filings with this Court, and other aggravating factors. Accordingly, for the following reasons, the Court **SUSPENDS** Respondent, Herbert S. Moncier, from the bar of the Eastern District of Tennessee.

I. PROCEDURAL HISTORY AND BACKGROUND

A. The Show Cause Order

On January 17, 2008, the Court ordered Respondent Herbert S. Moncier ("Respondent") to show cause why disciplinary action should not be taken against him for unethical and unprofessional conduct. The Show Cause Order made certain factual allegations regarding Respondent's conduct as counsel in a court proceeding before United States District Judge J. Ronnie Greer on November 17, 2006 (Court File No. 1). Specifically, the Show Cause Order alleged Respondent "repeatedly interrupted or spoke over the presiding judge," "accused the prosecution of engaging in a conspiracy to prevent him from trying cases due to his success in past [*771] trials," "threatened to 'sit there and remain moot,'[33] i.e, not provide a defense for his client, due to a potential conflict Respondent perceived," "contradict[ed] the court's admonishment," and disobeyed a direct order from the court that he stop [**7] interrupting and not say another word (*id.*, pp. 1-3).

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33 The transcript uses the word "moot," but the context clearly shows the word used or intended was "mute." *See United States v. Vassar*, No. 2:05-CR-75-3 (E.D. Tenn. filed Sept. 13, 2005), Court File No. 683, pp. 41-42.

The Show Cause Order informed Respondent that based upon those factual allegations, it appeared "Respondent's actions constitute a violation of an order of the court, abuse of the court, disrespect for the court, contemptuous behavior directed at the court, interference and needless prolongation of the proceeding before the court, and obstructive behavior" (*id.*, p. 1). The Show Cause Order quoted from Eastern District of Tennessee Local Rule 83.7 ("E.D.TN. LR" or "Local Rule"), which provides: "The court may impose discipline [for a violation] of the Rules of Professional Conduct [or for] unethical conduct tending to bring the court or the bar into disrepute." (*Id.*, p. 4).

The Show Cause Order gave Respondent twenty days to show cause why disciplinary action should not be taken against him (*id.*, p. 4). The Show Cause Order, citing E.D.TN. LR 83.7(d), specified what was required in Respondent's response (*id.*, pp. 4-5). [**8] The Show Cause Order directed Respondent to include in his response a specific request for a hearing or a statement specifically declining a hearing (*id.*, p. 5). Last, the Show Cause Order required Respondent to inform other judicial officers in this district before whom he had cases of the initiation of this action (*id.*).

The Show Cause Order, and indeed the local rules which it cited, made it clear what specific information was required in a response - namely whether the factual allegations in the Show Cause Order were accurate and, if those factual allegations were accurate, why disciplinary action would not be warranted.[34]

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[34] It became apparent to the Court after Respondent filed several non-responsive motions that Respondent was introducing extraneous and irrelevant matters into these proceedings. In an effort to clarify any misunderstanding Respondent may have had, the Court made clear to Respondent that he should focus on demonstrating the factual allegations were inaccurate, or that if accurate, disciplinary action was not warranted (Court File No. 6, p. 5)

B. The Underlying Conduct

The Show Cause Order relates to conduct of Respondent in a court proceeding before United States District [**9] Judge J. Ronnie Greer on November 17, 2006 (*see Vassar,* No. 2:05-CR-75-3, Court File No. 683). Because of Respondent's conduct during the course of the proceeding, Judge Greer had Respondent taken into custody. Subsequently, Judge Greer filed a Show Cause Order alleging Respondent had committed a criminal offense, i.e. contempt of court (*id.*, Court File No. 677). This charge was referred to the United States Attorney for this district who reviewed the charge and decided to prosecute Respondent. Thereafter, Respondent was tried and found guilty of criminal contempt of court. Judge Greer issued a written opinion explaining his findings and conclusions.[35] *United States v. Moncier,* 2007 U.S. Dist. LEXIS 39206, 2007 [*772] WL 1577718 (E.D. Tenn. May 30, 2007) ("*Moncier II*"). In his opinion, Judge Greer noted Respondent had exhibited disrespect and contempt for the institutional role of the judge. 2007 U.S. Dist. LEXIS 39206, [WL] at *3-4. The Court will return to this later.

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[35] Specifically, Judge Greer found Respondent guilty of criminal contempt in violation of 18 U.S.C. §§ 401(1) and 401(3). The allegations in the Show Cause Order are independent of Respondent's conviction. While a conviction in and of itself is grounds for disciplinary action, the Court [**10] is not relying upon Respondent's conviction; rather, the Court is relying upon Respondent's unethical and unprofessional conduct at the November 2006 hearing. In other words, even if Respondent had not been convicted of criminal contempt, the Court would still have initiated disciplinary action based solely upon Respondent's misconduct.

This does not mean, however, that the Court will not consider the relevant factual findings Judge Greer has made as a party directly privy to Respondent's conduct. Judge Greer's observations and insights as to the content and nature of Respondent's conduct and utterances are, quite obviously, relevant here.

Prior to the contempt of court trial, Respondent filed a motion seeking to disqualify Judge Greer from presiding over the trial. Judge Greer denied this motion in a written opinion. *United States v. Moncier,* 2007 U.S. Dist. LEXIS 30241, 2007 WL 1206731 (E.D. Tenn. Apr. 23, 2007) ("*Moncier I*"). This opinion also contains relevant factual background in this matter.

II. EASTERN DISTRICT OF TENNESSEE LOCAL RULE DEALING WITH DISCIPLINARY ACTION AGAINST MEMBERS OF ITS BAR

A. Federal Court Authority to Admit and Discipline

The very concept of a court carries with it certain authority necessary [**11] for it to function. "It has long been recognized that '[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution,' powers 'which cannot be dispensed with in a Court, because they are necessary to the exercise of all others." *Chambers v. NASCO, Inc.,* 501 U.S. 32, 43, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991) (quoting *United States v. Hudson,* 11 U.S. 32, 7 Cranch 32, 34, 3 L. Ed. 259 (1812)). Among these necessary powers is the power to demand submission to the authority and rules of the court. "Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates." *Id.* (quoting *Anderson v. Dunn,* 19 U.S. 204, 6 Wheat. 204, 227, 5 L. Ed. 242 (1821)). The necessary powers also include the powers to admit members to its bar and to regulate and discipline attorneys. "[T]he Court has held that a federal court has the power to control admission to its bar and to discipline attorneys who appear before it." *Id.; see also,*

Ex Parte Burr, 22 U.S. 529, 9 Wheat. 529, 531, 6 L. Ed. 152 (1824); *In the Matter of Searer*, 950 F. Supp. 811, 813 (W.D. Mich. 1996). [**12] Disciplining an attorney includes the authority to suspend and disbar that attorney.

> "Courts have long recognized their authority to suspend or disbar attorneys, an inherent power derived from the attorney's role as an officer of the court that granted admission." *In Re Hoare*, 155 F.3d. 937, 940 (8th Cir. 1998). As such, a court's power to discipline members of its bar is "autonomous." *In re Attorney Discipline Matter*, 98 F.3d 1082, 1087 (8th Cir. 1996) (citing *Theard v. United States*, 354 U.S. 278, 281, 77 S. Ct. 1274, 1 L. Ed. 2d 1342 (1957)).

In re Fletcher, 424 F.3d 783, 792 (8th Cir. 2005).

The power of a court to admit members to its bar carries with it the power to disbar a member. "This power of removal from the bar is possessed by all courts which have authority to admit attorneys to practice." *Bradley v. Fisher*, 80 U.S. 335, 354, 20 L. Ed. 646 (1871).

Attorney disciplinary proceedings are not civil actions and not criminal prosecutions. *Cunningham v. Ayers*, 921 F.2d 585, 586 (5th Cir. 1991) ("Disbarment proceedings are not for the purpose of punishment, [*773] but rather seek to determine the fitness of an official of the court to continue in that capacity and to protect the courts and the public from the official ministration of [**13] persons unfit to practice.") (citations omitted); *Searer*, 950 F. Supp. at 813. These proceedings are investigations into the fitness and conduct of attorneys admitted to the court's bar. *In re Lehtinen*, 332 B.R. 404, 412 (B.A.P. 9th Cir. 2005).

However, attorney disciplinary proceedings are "adversarial and quasi-criminal in nature," and "an attorney is entitled to procedural due process which includes notice and an opportunity to be heard in disbarment or suspension proceedings." *Dailey v. Vought Aircraft Co.*, 141 F.3d 224, 229 (5th Cir. 1998).

B. Local Rule 83.7

By local rules, the court of the Eastern District of Tennessee has adopted procedures for disciplining members of its bar who violate its standards. E.D.TN. LR 83.6 and 83.7. In part, Local Rule 83.7(a) reads:

> Conduct Subject to Discipline. The court may impose discipline on any member of its bar who has violated the Rules of Professional Conduct as adopted by the Supreme Court of Tennessee, or has engaged in unethical conduct tending to bring the court or the bar into disrepute. The court may also discipline any member who has been suspended or disbarred from the practice of law by the state in which he or she is a member, [**14] or by any court of record. Discipline which may be imposed includes disbarment, suspension, reprimand, or such other further disciplinary action as the court may deem appropriate and just.

By its text, the rule authorizes disciplinary actions against a member of the Eastern District of Tennessee bar who has (1) violated the Rules of Professional Conduct,[36] or (2) engaged in unethical conduct tending to

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[36] It is important to keep in mind the Tennessee Rules of Professional Conduct expressly do not "exhaust the moral and ethical considerations that should inform a lawyer," they "simply provide a framework for the ethical practice of law." Tenn. Sup. R. 8, Scope (2).

bring the court or the bar into disrepute.[37] The rule reads in the disjunctive so that a violation of either prong of the rule is sufficient to warrant the imposition of discipline.

The rule assigns to the Chief Judge of the Eastern District of Tennessee on behalf of the entire court the responsibility of initiating disciplinary action. In pertinent part it reads:

> Initiation of Disciplinary Proceedings. Formal disciplinary proceedings shall be initiated by the issuance of an order to show cause signed by the Chief Judge. An order to show cause may be issued by the Chief Judge on his or her own initiative or upon a complaint filed by any counsel of record or party to an action in this court. When such order is issued on the court's initiative, no separate complaint need be filed.

E.D.TN. LR 83.7(b).

The rule envisions a disciplinary action being initiated in either of two ways. First, an action can be initiated upon the receipt of a complaint filed by counsel of record in a lawsuit, or by a party to a lawsuit. If the action is based upon a complaint filed by counsel of record or a party, then the rule contains a list of items [*774] that must be included in the complaint. E.D.TN. LR 83.7(b)(1). In such an action, the counsel of record or the party is the complainant.

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[37] This prong of the rule does not give the court unfettered discretion. Unethical conduct must be defined by case law; widely accepted standards of the profession such as standards adopted by the American Bar Association, the American College of Trial Lawyers, and other such organizations; or the generally recognized standards of ethical and professional behavior in this district.

Second, an action can be initiated by the Chief Judge upon his own initiative. In such a case, no separate complaint is required. The Chief Judge may initiate action based upon facts personally observed or known by the Chief Judge, or which come to his knowledge through information provided to the Chief Judge by others. By either method, the initiation of the action begins an inquiry into the alleged conduction, as explained below; it is not in any way a determination of the truth of any matter.

In this case, no counsel of record or party filed a complaint with the Court. The Court authorized action on the Chief Judge's own initiative.

Regardless of how the action was initiated, if the action proceeds to the disciplinary stage, the Chief Judge must issue a show cause order. E.D.TN. LR 83.7(c)(2). The rule also contains specific requirements that must be contained in any response to the show cause order. E.D.TN. LR 83.7(d). Again, the show cause order is an initial stage in the process, which sets out the alleged conduct so as to afford the attorney in question a full and fair opportunity to deny, correct, or explain that account of the behavior; it is not a determination of the truth of any matter.

The rule requires a response from the attorney within twenty days of [**17] the entry of the show cause order. E.D.TN. LR 83.7(c)(2). The response is required to contain the following:

> (1) The name, address and telephone number of the respondent.
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> (2) A specific admission or denial of each of the factual allegations contained in the complaint and order to show cause and, in addition, a specific statement of any facts on which respondent relies, including all other

> material dates, places, persons and conduct relevant to the allegations of the order.
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> (3) All documents or other supporting evidence not previously filed with the complaint or order that are relevant to the charges of alleged misconduct.
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> (4) A specific request for a hearing or a statement specifically declining a hearing.
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> (5) A statement signed by the respondent under the penalty of perjury indicating that the respondent has read the response and that, to the best of respondent's knowledge, the facts alleged therein are correct.

E.D.TN. LR 83.7(d).

The rule provides that Respondent has the right to representation by counsel and also the right to call witnesses at any hearing. E.D.TN. LR 83.7(h)(3). All filings under the rule are under seal to protect the reputation of the attorney. *See* E.D.TN. LR 83.7(b), [**18] (d), (h)(2). The reputation of an attorney is one of his or her most valued possessions. *In re Williams,* 156 F.3d 86, 90 (1st Cir. 1998) ("It is trite, but true, that a lawyer's professional reputation is his stock in trade, and blemishes may prove harmful in a myriad of ways."). Most attorneys consider their reputation a badge of honor. Any complaint lodged against an attorney whether founded or unfounded is a stain on that badge. To quote from a very familiar formulation of the importance of an attorney's reputation:

> The reputation you develop for intellectual and ethical integrity will be your greatest asset or your worst enemy. You will be judged by your judgement. Treat every pleading, every brief, every contract, every letter, every

> daily task as if your career will be judged on it.
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> There is no victory, no advantage, no fee, no favor, which is worth even a blemish on your reputation for intellect [*775] and integrity ... Dents to [your] reputation are irreparable.[38]

The confidentiality rule serves to protect attorneys who may be charged with professional misconduct but have those charges later proven unfounded. However, it is important to note that the obligation of confidentiality is one-sided. The court and its staff are prohibited from disclosing the disciplinary action unless authorized by the Chief Judge. The accused attorney has First Amendment rights that are not diminished in the slightest by the court's local rule. The Local Rule does not contain a single word which imposes any secrecy or confidentiality obligation on the accused attorney, nor did any of the Court's orders in this case. Nothing forbids the accused attorney from shouting to the world from the heights of Mount LeConte or Lookout Mountain that disciplinary action has been initiated against him or her.[39] [9]

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[38] Excerpts from commencement speech by Vincent Foster given in May 1993 at the University of Arkansas School of Law.

[39] This freedom of the respondent-attorney to speak is the norm in disciplinary procedures of state bars. E.g., Tenn. Sup. R. 9, § 25.5 (". . .nothing in this Section or these Rules shall prohibit the complainant, respondent-attorney, or any witness from disclosing the existence or substance of a complaint, matter, investigation, or proceeding under these Rules or from disclosing the existence or substance of a complaint, matter, investigation, or proceeding under these Rules or from disclosing any documents or correspondence filed by, served on, or provided to that person."); Georgia State Bar Rules [**20] and Regulations, Rule 4-221(d)(3) ("Nothing in these rules shall prohibit the complainant, respondent or third party from disclosing information regarding a disciplinary proceeding, unless

Respondent, and any other accused attorney, would be free to disclose the initiation of the disciplinary process to anyone without any permission or authorization from the court. The court and its staff, however, would not be free to disclose the action, even to correct inaccurate information publically disclosed by the attorney, unless authorized by the Chief Judge. If an accused attorney desires the entire action open to the public, the attorney can waive the confidentiality protection afforded by the local rule and request the Court open the entire proceedings, as Respondent did in this case some weeks after the action was initiated.

Respondent's claim that the Chief Judge has unfettered discretion to authorize the public disclosure of the disciplinary proceeding is false (Court File No. 68, pp. 4-5). The relevant Local Rule states:

> All complaints relating to disciplinary matters under this rule shall [**21] be filed under seal with the clerk. All records pertaining to attorney disciplinary proceedings, except with respect to reinstatement proceedings, shall be confidential and kept under seal in the Clerk's Office unless otherwise ordered by the court.

E.D.TN. LR 83.7(b).

Confidentiality is the presumptive norm throughout proceedings of this nature, for the reasons explained above.[40] Confidentiality exists at two separate periods

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otherwise ordered by the Supreme Court or a Special Master in proceedings under these rules.").

[40] Confidentiality is also common during some phases of state disciplinary proceedings. *E.g.*, Tenn. Sup. R. 9, § 25.1 ("All matters, investigations, or proceedings involving allegations of misconduct

during the proceedings. First, at the initial [*776] phase when a show cause order is issued, Local Rule 83.7(b) provides, "All records pertaining to attorney disciplinary proceedings, except with respect to reinstatement proceedings, shall be confidential and kept under seal in the Clerk's Office unless otherwise ordered by the court." Here, this Court informed Respondent of the confidential nature of the proceedings in its Show Cause Order on January 17, 2008 (Court File No. 1, p. 5). The presumption of confidentiality is very strong at this phase, because a show cause order is issued prior to an attorney having any opportunity to address the allegations involved. The court can override this presumption, and open the record to the public, only upon compelling grounds, [**22] i.e. where failing to override the presumption of confidentiality would threaten immediate harm to the attorney's current and prospective clients, the legal system, and the general public.

Second, if a disciplinary hearing has been requested and is determined to be necessary, Local Rule 83.7(h)(2) provides, "Such hearings, at the discretion of the judicial officer, shall be confidential and shall be recorded." At this phase, the judicial officer presiding over the hearing has discretion to override the presumption of confidentiality and open the hearing to the public [**23] when there is a compelling reason to do so. This notion of "discretion" to override the confidentiality entails the legal definition of "discretion," which requires any decision based on the exercise of that discretion to be

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by or the disability of an attorney, including all hearings and all information, records, minutes, files or other documents of the Board, district committee members and Disciplinary Counsel shall be confidential and privileged, and shall not be public records. . ."); Georgia State Bar Rules and Regulations, Rule 4-221(d)(1) (keeping all disciplinary investigations and proceedings during the investigative stage confidential).

supported by facts, law, and reason. *See, e.g., Romstadt v. Allstate Ins. Co.*, 59 F.3d 608, 615 (6th Cir. 1995) (where the Court of Appeals for the Sixth Circuit reviews a district court's exercise of "discretion" to assure it does not rely on clearly erroneous findings of fact, improper application of the law, or an erroneous legal standard.)

As previously stated, under the local rules, the judicial officer must have a compelling reason to override the confidentiality protections, which are afforded to an attorney during the disciplinary proceedings. One obvious reason to override that protection is when the attorney in question waives the confidentiality afforded to him or her, and formally requests that the hearing be open to the public - as occurred here. Upon receipt of Respondent's signed waiver of confidentiality, Magistrate Judge Lee overrode the confidentiality provided in the local rules and the hearing was open to the public.

III. RESPONDENT'S LATE FILED RESPONSE

By the Court's Show Cause Order and the court's local rule, Respondent was required to file his response by February 6, 2008, addressing the accuracy of the factual assertions in the order and providing the other information required by E.D.TN. LR 83.7(d) (Court File No. 1, p. 4). Respondent did not file a response with any of this information by that time, disobeying the Court's Show Cause Order and the local rule.[41] [11] He also did not request or decline a hearing as required. *See* E.D.TN.

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[41] Tenn. Sup. R. 8, Tennessee Rules of Professional Conduct 8.4(g) provides: "It is professional misconduct for a lawyer to . . . [k]nowingly fail to comply with a final court order entered in a proceeding in which the lawyer is a party, unless the lawyer [**25] is unable to comply with the order or is seeking in good faith to determine the validity, scope, meaning, or application of the law upon which the order is based."

LR 83.7(d)(4). Instead, Respondent filed four non-responsive motions on February 4, 2008. The four motions were: (1) Motion for Extension (Court File No. 2); (2) Motion for Relief from Notification (Court File No. 3); (3) Motion for Disclosures (Court File No. 4); and (4) Motion to [*777] Dismiss Without Prejudice (Court File No. 5). Finding that none of these motions was meritorious,[42] the Court denied them on February 11, 2008 (Court File No. 6).

By the terms of the Court's Show Cause Order, Respondent was also ordered to notify all judicial officers in the district before whom he had pending cases of the initiation of the disciplinary action (Court File No. 1, p. 5). The Court assumed Respondent would make these notifications immediately upon receipt of the Show Cause Order. Respondent disobeyed this order and did not notify the other judicial officers immediately or even within the time frame for when a response was due.

Under the Local Rules, Respondent's failure to address the substance of the Show Cause Order and failure to request a hearing would have permitted the Court to proceed without a response or hearing from Respondent. However, this Court was reluctant to proceed in such a serious matter without providing Respondent, perhaps to excess, every opportunity to address the issues before the Court. The Court viewed his non-responsive motions as a general denial of the facts contained in the Show Cause [**26] Order and as a request for a hearing, so as to be able to continue with the procedural and substantive protections afforded to Respondent by the Local Rules (Court File No. 7).[43]

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[42] The Court will discuss these motions in more detail below.

[43] Based upon the failure of Respondent to file a response, pursuant to Local Rule 83.7(h), it was within the power of the Court to dispense with a hearing and proceed to take final action on the Show Cause Order. "A disciplinary hearing shall be held only when

Despite Respondent not timely requesting a hearing, the Court ordered a hearing to address the substance of the Show Cause Order. Put simply, the Court went out of its way to accommodate Respondent, despite Respondent's disregard for the local rules and order of the Court.

In relation to the irrelevant and non-meritorious filings the Respondent did make, the Court was disturbed by the unprofessional nature, tone, and content of Respondent's four motions, and "strongly urge[d] Respondent to obtain counsel to represent him in the hearing" (Court [**27] File No. 6, p. 5). The local rule was clear that Respondent had the right to legal representation, E.D.TN. LR 83.7(h)(3), and the Court's encouragement for Respondent to exercise that right was based on the assumption that Respondent's legal counsel would be better able to be objective and perform in a more professional manner.

The Court appointed Magistrate Judge Susan K. Lee of this district[44] as the judicial officer to investigate and conduct any hearing in this matter pursuant to Local Rule 83.7(g). In Magistrate Judge Lee's first order to Respondent, she also signaled to Respondent the benefit of counsel (Court File No. 8, p. 2). This advice was not accepted by Respondent, who on February 24, 2008, filed a statement saying he intended to represent himself (Court File No. 14). Magistrate Judge Lee issued an order on February 13, 2008, setting a hearing date and, because she was unable to conduct the hearing without Respondent's admissions or denials, required

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the member under investigation has requested such a hearing in a timely response and the judge or the judicial officer has determined that such a hearing is necessary for the proper disposition of the charges."

[44] Magistrate Judge Lee and the undersigned are resident in the Chattanooga Division of the District. [**28] Respondent has his office in Knoxville which is in the Knoxville Division of the District. Judge Greer is resident in the Greeneville Division of the District.

Respondent to file the response he had been ordered to file in the [*778] Show Cause Order but had failed to do (Court File No. 8).

Finally, on February 25, 2008, Respondent filed his response to the Show Cause Order, which had been due no later than February 6, 2008 (Court File No. 13).

IV. THE HEARING BEFORE MAGISTRATE JUDGE LEE, HER RECOMMENDATION, AND RESPONDENT'S EXCEPTIONS

A. The Hearing and Magistrate Judge Lee's Recommendation

Pursuant to the Court's appointment, Magistrate Judge Lee scheduled a hearing on the allegations in the Show Cause Order. On March 5, 2008 and March 6, 2008, Magistrate Judge Lee conducted the hearing (Court File Nos. 32, 33).[45] Respondent was represented at the hearing by attorney Ralph E. Harwell, who entered his appearance on the morning of the first day of the hearing.

At the hearing, Magistrate Judge Lee provided Respondent an opportunity to present any evidence or other information he wished. Respondent presented exhibits. The only witness presented was Respondent. Respondent testified over two days. His testimony was rambling, convoluted, often [**29] disconnected, and rarely addressed his conduct at issue. With respect to the factual allegations in the Show Cause Order, Respondent attempted to explain them away; when pressed by Magistrate Judge Lee, Respondent largely admitted the accuracy of the allegations, but not without evasions, equivocations, dissemblances, and justifications. Magistrate Judge Lee also listened to

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[45] The Transcript of this hearing will be referred to in this opinion as "Tr. ."

arguments of Respondent's counsel.[46] Furthermore, Respondent requested and was granted permission to submit additional evidence after the hearing. Respondent supplemented his own testimony and provided numerous statements from other witnesses, predominantly other attorneys who were not present at the hearing (*see* Court File Nos. 35-64).

Following the hearing, on April 7, 2008, Magistrate Judge Lee filed a very thorough, well-written and carefully reasoned Recommendation (Court File No. 65; *In re Moncier*, 2008 U.S. Dist. LEXIS 78458, 2008 WL 1808547 (E.D.Tenn. Apr. 7, 2008)).[47] In the Recommendation, Magistrate Judge Lee carefully recounted what had transpired in the case up to the date of the hearing; what the transcript[48] of the hearing before Judge Greer, which contained Respondent's conduct leading to the Show Cause Order, showed; what transpired in the hearing before Magistrate Judge Lee;

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[46] At the hearing before Magistrate Judge Lee, "Respondent claimed the original confidential nature of the disciplinary proceedings prevented him from communicating with potential witnesses." (Court File No. 65, p. 36). This is blatantly untrue. The Local Rule clearly states an accused member of the bar has the right to representation by counsel, to present witnesses and other evidence, and to confront and cross-examine adverse witnesses. E.D.TN. LR 83.7(h)(1). Magistrate Judge Lee, in repeating the language of the rule, also informed Respondent he was permitted to present witnesses (Court File No. 8, p. 2). As discussed above, nothing in the Local Rule or Court orders prohibited Respondent from communicating the initiation of the disciplinary action to anyone he chose, including witnesses or other attorneys that might have provided him assistance.

[47] Citations to Magistrate Judge Lee's Recommendation will be made to the Recommendation as it appears in the record of this case.

[48] This transcript, *United States v. Vassar*, No. 2:05-CR-75-3 (E.D. Tenn. filed Sept. 13, 2005), Court File No. 683, will be referred to in this opinion as "Vasser Tr. ."

Respondent's evidentiary submissions made during and after the hearing; Respondent's testimony and responses to the Show Cause Order; and [*779] Respondent's objections. She did so in a comprehensive manner. After considering Respondent's evidence and arguments, Magistrate Judge Lee thoughtfully analyzed the factual allegations in the Show Cause Order, Local Rule 83.7, and other applicable authority, and concluded the factual allegations were accurate. In fact, she found that Respondent did not seriously dispute the factual allegations (Court File No. 65, p. 44). She also found by clear and convincing evidence Respondent had "engaged in: (a) disruptive behavior during the November 2006 hearing; (b) disobedience of a direct order of the court during the hearing; and (c) unprofessional and unethical behavior that violates the Rules of Professional Conduct or brings the court or bar into disrepute during the hearing" (*id.* at 56). After noting Respondent had not apologized for his unethical and unprofessional conduct, but only for the results of his misbehavior (*id.* at 57), and that it is questionable "whether Respondent is likely to correct his unethical and unprofessional conduct without some form of meaningful discipline under Rule 83.7," Magistrate Judge Lee recommended that this Court "impose appropriate discipline for Respondent's conduct during the November 2006 hearing" (*id.* at 61).

Pursuant to Local Rule 83.7(i)(2), Magistrate Judge Lee provided notice to Respondent that any exceptions or objections to her report were to be submitted within ten days of her Recommendation (*id.*).

B. Respondent's Objections to Magistrate Judge Lee's Recommendation

On April 18, 2008, Respondent filed his Exceptions to Magistrate Judge Lee's Recommendation (Court File No. 68). His twenty-five page Exceptions contain twenty

individual exceptions or objections, and 123 individual paragraphs.

As an initial observation, the Court recognized a noticeable improvement in the tone and quality of the Exceptions when compared to Respondent's previous filings. Much of the shoddiness, sloppiness, misspellings, and unprofessional tone the Court observed in Respondent's earlier submissions was absent in Respondent's Exceptions, although unfortunately the Exceptions still contain many of the same frivolous arguments, unsupported and underdeveloped contentions, and unfounded accusations of Respondent's previous filings. Nevertheless, the quality improved - an indication the Court was correct when it strongly urged Respondent to obtain counsel to represent him in these proceedings. It is unfortunate he did not accept the Court's suggestion initially, before Respondent's earlier, wholly unprofessional filings became a part of the record. No one, not the Court, the public, the profession, or Respondent, benefitted from Respondent's earlier shoddy and unprofessional filings.

The most telling aspect of Respondent's Exceptions is the complete omission of even a single challenge to any of the substantive findings or recommendations in Magistrate Judge Lee's Recommendation. Respondent does not offer an objection to any of Magistrate Judge Lee's findings or recommendations on the merits of this matter. The Court takes as a testament to the fine work performed by Magistrate Judge Lee that Respondent cannot lodge even a single objection of substance on the merits to her findings and recommendations.

Unfortunately, what is also glaringly absent from Respondent's Exceptions is any appreciation on Respondent's part that his behavior before Judge Greer in the November hearing was improper. Respondent's Exceptions are entirely focused on avoiding blame or discipline for his unprofessional [*780] behavior, using

shallow arguments based upon his misunderstanding and mischaracterization of the local rules, the disciplinary proceedings, and the law.

V. DISCUSSION

The Court will now consider Respondent's Exceptions to Magistrate Judge Lee's Recommendation. In doing so, the Court also will discuss the Recommendation, Respondent's testimony at the hearing, his response to the Show Cause Order, and other motions and filings Respondent submitted in this proceeding.

Some of these matters are not among the factual allegations in the Show Cause Order and will not inform this Court's decision on whether Respondent engaged in unethical and unprofessional conduct in the November 2006 hearing before Judge Greer. However, the Court also is charged with determining the appropriate disciplinary action to promote and maintain the standards of professional and ethical behavior required of Respondent and all attorneys before the federal courts of the Eastern District of Tennessee. As such, all of the matters considered here are highly pertinent to this second determination, because they demonstrate whether Respondent now accepts the professional and ethical obligations required of members of the bar of this court; whether his unethical and unprofessional behavior alleged in the Show Cause Order is likely to be repeated in the future; and what disciplinary measures are required to assure Respondent's future compliance with the professional and ethical standards of this bar.

A. Respondent's Exceptions to Magistrate Judge Lee's Recommendation

Although his Exceptions are numerous, they do not require extensive discussion. The Exceptions do not challenge any of the findings or recommendations Magistrate Judge Lee made regarding the merits of the

proceedings. Respondent does not object to Magistrate Judge Lee's findings that: (1) he interrupted Judge Greer during the November 2006 hearing; (2) he accused his opposing counsel of involvement in a conspiracy against him; (3) he threatened to abandon his client; (4) he willfully and intentionally disobeyed a direct order from Judge Greer; (5) he engaged in professional misconduct that violates the Tennessee Rules of Professional Conduct and constitutes unethical conduct that tends to bring the court and bar into disrepute; (6) he is not apologetic for his misconduct; (7) he is likely to repeat the misconduct because he fails to acknowledge his actions constitute unprofessional misconduct; and (8) discipline is necessary.

All of Respondent's exceptions are procedural in nature and many merely regurgitate earlier arguments. They can be broken down into just a few categories, as follows:

1. Magistrate Judge Lee and the undersigned must be disqualified because they are embroiled in a public controversy with Respondent (Exceptions I and II)

Respondent alleges that Magistrate Judge Lee and the undersigned are involved in a public controversy with him arising out of some unidentified newspaper articles in an unidentified newspaper (Court File No. 68, pp. 1-5). Respondent has not placed these in the record. Nothing in the record of these proceedings suggests any controversy involving members of this court. Federal judges are sometimes the subject of criticism or unflattering portrayals in the media based upon their decisions. This Court is no exception. However, media coverage or criticism, in and of itself, does not constitute "public controversy." If it did, every [*781] judge that made an unpopular ruling that drew media coverage would be disqualified from further involvement with

that particular case. The Court is not aware of any "public controversy" in which it or the Magistrate Judge is involved, or any which has "embroiled" the court (*id.*).

2. Discipline is barred as double jeopardy because Judge Greer has already punished him (Exception III)

The Court finds no merit in Respondent's double jeopardy argument. Double jeopardy prevents a person from being punished *criminally* for the same offense. *Herbert v. Billy*, 160 F.3d 1131, 1136 (6th Cir. 1998)(citing *Witte v. United States*, 515 U.S. 389, 396, 115 S. Ct. 2199, 132 L. Ed. 2d 351 (1995)). A disciplinary proceeding is not a criminal proceeding, nor is attorney discipline equivalent to criminal punishment. *See Searer*, 950 F. Supp. at 813. [49]

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[49] Respondent does not acknowledge or address these or any similar cases, which are directly on point, in his Exceptions. Instead, Respondent cites two United States Supreme Court cases which provide him no apparent legal support. In *United States v. Ursery*, 518 U.S. 267, 270, 116 S. Ct. 2135, 135 L. Ed. 2d 549 (1996), the Supreme Court held proceedings for criminal drug offenses and civil forfeiture of the drugs and money involved did not invoke double jeopardy. In *United States v. Bajakajian*, 524 U.S. 321, 324, 328, 334-35, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1999), the Supreme Court determined that the civil forfeiture of currency involved in a criminal offense for failing to report exported currency was punishment, and violated the Eighth Amendment prohibition against excessive fines, because the amount of the civil forfeiture was grossly disproportionate to the gravity of the offense. Respondent makes no meaningful effort to relate the facts or underlying law of these cases to the facts before this Court. The Court can only conclude this is yet another successful attempt by Respondent to waste the Court's time and resources, and shows a complete lack of respect for the Court, the profession, and the public - whose taxes fund the Court and who relies upon the Court to administer the law in all the civil and criminal matters currently pending before it, while the Court instead must address Respondent's spurious Exception.

Disciplinary and criminal proceedings are of fundamentally different natures. Respondent's conviction for criminal contempt and the proceedings here have two distinct purposes, operating in two distinct spheres. Judge Greer could not have disbarred Respondent from the federal bar for the Eastern District of Tennessee as a result [**39] of his criminal contempt conviction any more than this Court could convict Respondent of a crime for violating the ethical and professional standards of the Eastern District of Tennessee.

Respondent's argument is ultimately most exasperating because, in addition to lacking any legal support, it defies logic. According to Respondent, double jeopardy prevents an attorney from being both convicted of a criminal offense and disciplined by a federal court in its maintenance of the ethical and professional standards of the members of its bar. If that were true, an attorney convicted of fraud, murder, treason, or any other criminal offense would be protected by double jeopardy from being disbarred for that underlying conduct. The federal court, in turn, might shield such an attorney from being criminally convicted if it disbarred the attorney based upon the same conduct which would support a criminal conviction.

3. Preclusive effect and consideration of Judge Greer's factual findings (Exceptions IV, V, VI, IX, X)

Respondent makes numerous arguments disputing this Court's ability to consider the factual findings made by Judge Greer in Respondent's criminal contempt conviction (Court File No. [**40] 68, pp. 7-11, 14-17). Respondent argues the Court is precluded from doing so based on the Show Cause [*782] Order (*id.*, p. 7); he was denied due process as a result (*id.*, p. 9); he was "blindsided" by the use of those findings (*id.*, p. 10); and

use of Judge Greer's factual findings constitutes issue preclusion, which Respondent then argues is impermissible (*id.*, pp. 15-17).

Respondent does not factually or legally develop most of these arguments so as to provide this Court with a solid basis to analyze his exceptions. Instead, Respondent states vague conclusions and provides very little else with which this Court might decipher the nature, purpose, and relevancy of his arguments. Put simply, this Court cannot consider and respond to what is not provided. *See McPherson v. Kelsey,* 125 F.3d 989, 995-96 (6th Cir. 1997) ("Issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to . . . put flesh on its bones.").

However, the Court endeavors here to respond as best as it is able in light of the predominantly inadequately-explained, legally-unsupported, and factually-barren arguments presented. In relation to Exception IV, despite Respondent's continued assertion these proceedings rely upon his criminal contempt conviction (Court File No. 68, pp. 7-9), the Show Cause Order clearly states the Court is reviewing the conduct at the November 2006 hearing, not the conviction that resulted from it (Court File No. 1, p. 3 n.1). The Court's determination here, and Magistrate Judge Lee's Recommendation, is based upon the conduct at the November 2006 hearing; the Court is not concerned here with whether that conduct fulfills the legal requirements for a criminal contempt conviction.

Addressing Exceptions V, VI, and IX, Respondent's claim that he was somehow "blindsided" by the consideration of Judge Greer's factual account of his conduct, provided in his written opinion, is surprising (*see* Court File No. 68, pp. 9-11, 14). Respondent was

certainly aware of those factual findings, discussed in detail in his contempt conviction. *See Moncier II,* 2007 U.S. Dist. LEXIS 39206, 2007 WL 1577718. It defies credibility that Respondent had not read the opinion accompanying his criminal contempt conviction. Perhaps more troubling, however, is Respondent's expectation that the Court would ignore Judge Greer's clearly-detailed impressions of the events, and it would blindly accept Respondent's often evasive, revisionist, and self-serving account of his conduct - including representations of how Judge Greer actually perceived his behavior which completely contradict Judge Greer's own account.[50]

In relation to Exception X, Respondent's argument based upon issue preclusion is to no avail (Court File No. 68, pp. 15-17). Magistrate Judge Lee thoroughly addressed this issue at length in her Recommendation as it pertained to Respondent's violation of the court order and the obstruction it caused (Court File No. 65, pp. 46-51). This Court will also make a few additional points here. First, courts regularly give preclusive effect in disciplinary proceedings to factual findings of judges who witnessed the conduct, because those judges, having been physically present and having heard, seen, and reviewed the relevant evidence and conduct firsthand, are in the best position to assess [**43] the nature, demeanor, and atmosphere involved. *See In re Peters,* -- F.Supp.2d --, 2008 U.S. Dist. LEXIS 29454, 2008 WL 1000131, *3-4 (S.D.N.Y. Apr. 10, 2008) (providing preclusive effect [*783] in a disciplinary proceeding to factual findings of the judge's opinion ordering sanctions).

Second, even if this Court did not give preclusive effect to Judge Greer's factual findings, those findings

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[50] Perhaps the most egregious example of this is Respondent's submission of an affidavit from Ms. Bethany Dumas (Court File No. 36), which is discussed in considerable detail below.

would be given substantial deference for the same reasons as above. *See* 2008 U.S. Dist. LEXIS 29454, [WL] at *4. This concept is no different than the traditional deference an appellate court gives to the factual findings of a trial judge, who is best-positioned to make observations of a witness' demeanor, having been present in the courtroom during the testimony. *See United States v. Lopez-Medina,* 461 F.3d 724, 737 (6th Cir. 2006) ("The district court's credibility findings are entitled to particular deference, because the district court is in a better position than [the appellate court] to observe a witness's demeanor.") (citing *United States v. Johnson,* 344 F.3d 562, 567 (6th Cir. 2003)).

Third, this Court's only use of Judge Greer's opinion is the factual findings as to Respondent's disrespectful and unprofessional conduct. Respondent provides no argument why Judge Greer's carefully and thoroughly written opinion somehow misrepresents how Judge Greer actually perceived Respondent's conduct. This appears to be yet another spurious argument in Respondent's attempts to deliberately delay these proceedings.

4. Respondent should be allowed to cross-examine Judge Greer and this Court (Exceptions VII, VIII)

Respondent argues he was denied his rights pursuant to E.D.TN. LR 83.7(h)(3) because he was not permitted to call Judge Greer as a witness for cross-examination (Court File No. 68, pp. 12-14). It is unclear what alleged deprivation Respondent believes he suffered by not having Judge Greer as a witness. As Magistrate Judge Lee correctly stated, "judges speak through their orders" (Court File No. 65, p. 42 n.16). *See Crenshaw v. Dywan,* 34 F. Supp. 2d 707, 710 (N.D. Ind. 1999) (citing *Fayerweather v. Ritch,* 195 U.S. 276, 307, 25 S. Ct. 58, 49 L. Ed. 193 (1904)). Respondent has not provided any reason why Judge Greer's written opinion,

detailing his factual findings and perceptions concerning Respondent's conduct, was inadequate here.

Furthermore, Respondent argues he had a right to cross-examine this Court, because this Court issued the Show Cause Order (Court File No. 68, pp. 13-14). Respondent argues cross-examination of this Court is necessary to solicit the Court's "opinions and conclusions" on the matter (*id.*). This basis is confused on two grounds. First, the Show Cause Order is, by its nature, not a conclusion, but rather the initiation of proceedings aimed at determining the appropriate conclusions to be drawn from the behavior set forth in the Show Cause Order. Second, any information Respondent required from this Court was put forth in the Show Cause Order, which is, in fact, the entire purpose of the Show Cause Order.

5. Respondent did not have twenty days notice of hearing (Exceptions XI)

Respondent argues he did not have a twenty-day notice before the scheduled hearing pursuant to E.D.TN. LR 83.7(h)(1) (Court File No. 68, pp. 17-20). On February 13, 2008, Magistrate Judge Lee issued an order setting the hearing date for March 5, 2008 (Court File No. 8). The period of time between the order and the hearing was twenty-one days. Respondent's Exception is without merit.

6. Court did not sufficiently apply *In Re Snyder* (Exception XII)

Respondent claims Magistrate Judge Lee "failed to apply the correct Supreme Court standard in *[In Re] Snyder* [472 U.S. 634, 105 S. Ct. 2874, 86 L. Ed. 2d 504 (1985)]" (Court File No. 68, pp. 20-21). Respondent does not actually state in what [*784] way he alleges Magistrate Judge Lee failed to do so. To the extent Respondent seeks an assurance that this Court is familiar with the requirements of *In Re Snyder* and

considers those requirements here accordingly, this Court has done so.

7. Respondent sufficiently apologized for his conduct, or cannot be punished for failing to do so (Exceptions XIII)

Respondent asserts he cannot be disciplined for declining to apologize for his conduct or for giving an insufficient apology. As an initial point, this Exception is a non-issue. The Court considers only Respondent's conduct at the November 2006 hearing in determining whether Respondent is subject to attorney discipline pursuant to E.D.TN. LR 83.7.

The nature of Respondent's apology is relevant, however, to this Court's consideration of whether Respondent appreciates the unprofessional and unethical nature of his conduct, whether he is likely to repeat such conduct, and what discipline is necessarily to maintain the professional and ethical standards of attorneys in the Eastern District of Tennessee. Respondent's apology can be best explained in Respondent's own words:

I reiterate what I said from the time I was taken into custody and that is, I deeply regret and apologize that my actions were considered by District Judge Greer to be a violation of his orders and that now, my actions have been considered by Senior [sic] District Judge Collier to be violations of the Rules of Professional Conduct.

(Court File No. 57 at 3).

Essentially, Respondent is sorry Judge Greer and the Court think Respondent did something wrong, and he is sorry he has been adversely affected by that. Nowhere in his "apology" does Respondent recognize his conduct was inappropriate nor does he express any regret for

conducting himself unprofessionally, showing disrespect for the court and opposing counsel, and directly violating a court order. The Court sees Respondent's back-handed, ethereal apology as part of a larger course of conduct. As Magistrate Judge Lee aptly phrased it, "His refusal to recognize his conduct was inappropriate, unprofessional, unethical, and unbecoming an officer of the court calls into question whether Respondent is likely to correct his improper conduct without some form of meaningful discipline under Local Rule 83.7" (Court File No. 65, p. 59).

8. Magistrate Judge Lee impermissibly reserved issues for this Court's consideration (Exception XIV)

Respondent argues Magistrate Judge Lee was not permitted to make a recommendation that discipline was appropriate without also making a recommendation as to the appropriate disciplinary action (Court File No. 68, pp. 21-22). Local Rule 83.7(i) reads: "The judicial officer [conducting the hearing] shall prepare a written recommendation which shall include a proposed disposition of the disciplinary charges." The rule clearly provides for a "proposed disposition of the disciplinary *charges*." A charge is disposed of when it is determined that discipline is warranted or not warranted. Magistrate Judge Lee recommended a disposition of the charge, writing, based upon Respondent's conduct, "the [**49] court [should] impose appropriate discipline for Respondent's conduct during the November 2006 hearing" (Court File No. 65, p. 61). It is now the obligation of this Court to determine whether Magistrate Judge Lee's recommendation should be accepted, and if so, what the appropriate disciplinary action is.

9. Adopted and renewed exceptions (Exceptions XV - XIX)

Respondent superficially argues numerous "adopted and renewed exceptions to pre-hearing rulings" (Court File No. 68, [*785] pp. 22-25). These exceptions would be unlikely to make any legal or logical sense even if Respondent had dedicated more than a few cursory, vague sentences to each exception. Due to Respondent's failure to substantiate his assertions with law or reason, the Court is unable to fully address them. *See McPherson*, 125 F.3d at 995-96. However, the Court will endeavor to address them to the best of its ability, despite Respondent's lack of explanation of the clear contours, substance, and legal and factual support for the exceptions.

Exception XV. Respondent argues a Magistrate Judge does not have jurisdiction pursuant to 28 U.S.C. § 631 to recommend discipline (Court File No. 68, p. 22). This statute is inapplicable here. [**50] Federal courts have the authority to adopt and enforce standards of conduct for the attorneys practicing before them. *See, e.g., NASCO*, 501 U.S. at 43. This Court has done so and, in accordance with E.D.TN. LR 83.7(g), permits appointment of a judicial officer, such as a Magistrate Judge, to investigate potential misconduct, conduct disciplinary hearings, and issue a written recommendation.

Exception XVI. Respondent argues Magistrate Judge Lee and this Court harbor some secret bias against him (Court File No. 68, p. 22). Respondent has shown no evidence or valid basis for such bias, nor does any exist.

Exception XVII. Respondent appears to be raising two objections here. First, Respondent argues he was unfairly saddled with a burden of proof to explain his conduct (Court File No. 68, pp. 22-23). The transcript of the November 2006 hearing is clear and convincing evidence of what was said at that hearing, which Respondent does not appear to dispute. Judge Greer's factual findings in Respondent's criminal contempt

conviction are clear and convincing evidence of Judge Greer's perceptions of what occurred at the hearing. Rather than being saddled with a burden of proof, Respondent was provided an opportunity to explain his conduct at that hearing to the Court.

Second, Respondent's argument seems to be asserting a belief that a show cause order is in some way an inadequate basis in which to proceed with a disciplinary hearing (*see id.*). A show cause order is the method by which disciplinary proceedings are initiated in this court, *see* E.D. TN. 83.7(b), and provides Respondent with a notice of the allegations involved. All the evidence upon which the Show Cause Order was based was available to Respondent at all times during these proceedings. The Show Cause Order provided adequate notice to Respondent of the allegations and basis of those allegations.

Exception XVIII. Respondent claims he had no right to present evidence and witnesses, pursuant to E.D.TN. LR 83.7(h)(3) (Court File No. 68, p. 24). This is false. In fact, Respondent was permitted to call witnesses, and Respondent was clearly informed of this by Local Rule 83.7(h)(3) and Magistrate Judge Lee's order of February 13, 2008 (Court File No. 8, p. 2) ("[Respondent] is entitled to be represented by counsel, to present witnesses and other evidence, and to confront and cross-examine witnesses, if any."). Respondent was the only witness present at the hearing; no other witnesses were present for any of the two-day hearing. Nevertheless, Magistrate Judge Lee still permitted Respondent to testify as to what he expected other witnesses would say. This testimony, on the whole, was cumulative, when relevant, and proved immaterial to the ultimate decision. In addition, Respondent was permitted to submit evidence after the hearing, and filed nearly two dozen declarations from other witnesses. These witnesses possess no personal knowledge of the

November 2006 [*786] hearing, as none of the witnesses are claimed to have been present, and are thus not material to that issue.

Exception XIX. Respondent summarily lists numerous other exceptions which he calls "defenses," including double jeopardy and collateral estoppel and - presumably in an attempt to excuse or justify his misconduct - necessity, coercion, and entrapment by Assistant United States Attorney M. Neil Smith (Court File No. 68, p. 24). This Court cannot properly address arguments which are nothing more than invocations of legal doctrines without any explanation of their application to this case. *See McPherson,* 125 F.3d at 995-96. However, even if Respondent had actually argued these defenses to any significant degree, none of these defenses can excuse or justify Respondent's conduct throughout the November 17, 2006 hearing. They do not somehow erase the disrespect and unprofessional behavior he exhibited; his failure to obey a direct order of the Court; or, indeed, his subsequent refusal, as these defenses further show, to recognize and take steps to assure he does not repeat his unprofessional and unethical conduct in the future.[51]

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[51] A few of Respondent's conclusory objections indicate Respondent wishes to argue his conduct in continuing to interrupt Judge Greer, despite being ordered not to do so, was somehow either justified ("justification that Respondent was performing a duty required of him by law") or excused ("necessity required to protect the interest of Respondent's client; coercion by his duty to protect interest of Respondent's client; and entrapment by AUSA M. Neil Smith's letter of November 16, 2008") (Court File No. 68, p. 24). These arguments, in addition to being presented to this Court as nothing more than conclusions with no factual or legal support, are wholly deficient in two other major respects.

First, all orders of the court must be followed by the parties before it. *Maness v. Meyers,* 419 U.S. 449, 459, 95 S. Ct. 584, 42 L. Ed. 2d 574 (1975) (citing *United States v. United Mine Workers,* 330 U.S. 258, 293, 67 S. Ct. 677, 91 L. Ed. 884 (1947) ("[A]n order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and

The Court feels compelled to address the shifting, post-hoc rationalizations Respondent has made in attempting to avoid the consequences of his actions. Respondent, as presumably is the unstated basis of his justification defenses (*see* Court File No. 68, p. 24),[52] has asserted he was either [*787] somehow obligated to speak to his client in violation of the order of the court to refrain from continuing to interrupt Judge Greer (*e.g.*, Tr. 127), or he was otherwise seeking clarification of Judge Greer's unequivocal order not to speak (*e.g.*, Tr.

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proper proceedings."). "Persons who make private determinations of the law and refuse to obey an order generally risk criminal contempt *even if the order is ultimately ruled incorrect." Id.* at 458-59 (emphasis added); *accord Walker v. City of Birmingham*, 388 U.S. 307, 320-21, 87 S. Ct. 1824, 18 L. Ed. 2d 1210 (1967) (". . . in the fair administration of justice no man can be judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics, or religion."); *Howat v. Kansas*, 258 U.S. 181, 189-90, 42 S. Ct. 277, 66 L. Ed. 550 (1922); *Worden v. Searls*, 121 U.S. 14, 26-27, 7 S. Ct. 814, 30 L. Ed. 853, 1887 Dec. Comm'r Pat. 296 (1887). Respondent's implication that he was somehow allowed to or justified in violating the court's order is wholly without merit.

Second, Respondent's justifications and excuses, to the extent they might relate to the conduct here, would seem to only relate to Respondent's final act of misconduct at the November 17, 2006 hearing. Even if Respondent believes the incorrect notion that he was in some way legally-compelled to disobey the court's order to stop interrupting at the end of the hearing to prevent his client from answering Judge Greer's questions concerning a potential conflict (a conflict Respondent himself raised, then later disavowed without explanation), that leaves unaddressed the other unprofessional and unethical conduct exhibited by Respondent and addressed here - i.e. his repeated interruptions and accusations made against the court and the Assistant U.S. Attorney throughout the hearing.

52 Again, Respondent provides no factual or legal basis for his justification arguments, which span less than one full sentence (Court File No. 68, p. 24), and this Court cannot address what is not presented to it. *See McPherson*, 125 F.3d at 995-96.

133). The result of either argument is that Respondent believes he did nothing unprofessional or unethical.

However, Respondent also argues his allegedly professional, ethical, and duty-bound conduct was a result of "entrapment by AUSA M. Neil Smith's letter of November 16, 2008" (Court File No. 68, p. 24) and was a product of being "goaded" by the prosecution (Court File No. 13, p. 26) (where Respondent asserted being goaded as an affirmative defense for his misconduct).

It speaks volumes of Respondent's lack of respect for this court when he asserts, "I believed I had a duty to do what I did, and I would have done it before any district court judge" (Tr. 127), only to then immediately blame opposing counsel for somehow entrapping or goading him into behaving in a way he then seems to concede was inappropriate (Court File Nos. 13, p. 26; 68, p. 24). Either Respondent is arguing he was tricked or goaded into conduct he believed was ethical, or he is asserting two contradictory positions to this Court. Such conduct is not only exasperating but also incredibly disappointing from a member of the bar of the Eastern District of Tennessee.

Exception XX. Respondent argues this Court cannot proceed with any disciplinary determination or action against him until the Sixth Circuit Court of Appeals has made a final ruling on his criminal contempt conviction (Court File No. 68, pp. 24-25). As previously and repeatedly stated, this Court's disciplinary proceeding and determination is independent of any criminal contempt conviction. The Sixth Circuit, in its March 5, 2008 denial of Respondent's motion to stay these proceedings pending his appeal, wrote: "The disciplinary proceedings now pending before the district court are distinct from this appeal from a criminal conviction. [Respondent] does not cite any legal authority that there is a requirement that the appeal of the criminal contempt proceedings must be concluded before the

disciplinary proceedings can go forward." Furthermore, whether the Sixth Circuit determines Respondent's conduct satisfied the legal requirements to establish criminal contempt pursuant to 18 U.S.C. § 401(1) and (3) has no bearing on the determinations of this Court pursuant to E.D.TN. LR 83.6, 83.7.

Respondent further argues Magistrate Judge Lee cannot rely on the factual findings of Judge Greer, concerning Judge Greer's own, first-hand perception of Respondent's conduct, because those findings are on appeal. Respondent's argument is absurd; the Sixth Circuit will not, nor could it logically, "overturn" Judge Greer's own factual account and perceptions of the offensive nature of Respondent's behavior. *See Moncier II*, 2007 U.S. Dist. LEXIS 39206, 2007 WL 1577718.

10. Conclusion

As explained above, Respondent's Exceptions to the Recommendation (Court File No. 68) are devoid of merit and denied by this Court.

B. Response to Order to Show Cause (Court File No. 13)

On February 25, 2008, Respondent filed the response required by the Show Cause Order. The response is twenty-seven pages in length and, while Respondent does address the factual allegations in the Show Cause Order, he often does not provide [*788] a specific admission or denial of the factual allegations. Those factual allegations to which he does not offer a specific denial the Court will deem to be true and admitted.

As to the factual allegations in the Show Cause Order, Respondent responded as follows:

(1) Respondent repeatedly interrupted or spoke over the presiding judge. Allegation III[53]

Response III. 4. "Respondent admits that the transcript reflect [sic] uncompleted sentences by both the District Judge and Respondent." (*Id.*, p. 17).

(2) Respondent accused the prosecution of engaging in a conspiracy to prevent him from trying cases due to his success in past trials. Allegation IV

Response IV. 5. "Respondent avers and will offer evidence at a hearing that Respondent had a reasonable basis to make the statements cited in the Show Cause Order pertaining to AUSA Smith and the prosecution team in Greeneville Division (sic) of this Court." (*Id.*, p. 18).

(3) Respondent threatened to abandon client. Allegation V.

Response V. 2. "Respondent admits making the cited statement." (*Id.*, p. 18).

(4) Respondent disobeyed order of Judge Greer. Allegation IX.

Response IX. 2. "Respondent admits the transcript of November 17, 2006 and the pages cited in the Show Cause Order. 3. Respondent avers that the transcript of November 17, 2006 speaks for itself." (*Id.*, p. 25).

Based upon Respondent's admissions or failure to deny the above factual allegations, the Court deems Respondent to have admitted (1) he repeatedly interrupted and spoke over Judge Greer, (2) he accused the prosecution of engaging in a conspiracy against

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53 Respondent uses Roman numerals to label his responses. For the sake of clarity, the Court will use Respondent's system.

him,[54] (3) he threatened to abandon his client, and (4) he disobeyed a direct order of Judge Greer.

In addition to the above-quoted passages, Respondent's response also includes a great deal of rambling, irrelevant material. Respondent goes on for many pages discussing the prosecution of Harold Grooms and others who are unrelated to the inquiry here. He spends time discussing what he perceives as bias against him by government agents.

In a remarkable admission, Respondent in his (Second)[55] Affirmative Response 3, says: "Respondent affirmatively asserts that his conduct on November 17th was goaded by wrongful conduct of the prosecution team in Greeneville Tennessee (sic)" (Court File No. 13, p. 26). Trial litigation is inherently stressful and attorneys will often face provocations. However, an attorney can never allow himself to be "goaded" into professional misconduct. One of the primary reasons there are professional standards is so, in the heat of battle, the professional exercises discipline and does not resort to unethical and unprofessional behavior. To the extent an [*789] attorney does not possess the necessary discipline to withstand "goading," that attorney may not be fit for the practice of law.

C. Respondent's Motions and Filings

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54 Before Magistrate Judge Lee, Respondent quibbled over whether he used the word conspiracy but conceded he had claimed the prosecuting attorney had engaged in concerted action against him. This amounts to a claim of a conspiracy. By this, he admits he had accused opposing counsel of professional misconduct. Magistrate Judge Lee found that this factual allegation is accurate (Court File No. 65, pp. 31, 43).

55 Respondent includes two affirmative responses numbered "3." The Court refers to the latter of the two.

Because Respondent is alleged to have engaged in unethical and unprofessional conduct, having disobeyed a direct order of a member of this court and demonstrating disrespect for the institutional role of the court, the Court read with interest Respondent's motions and filings in these proceedings. Facing a disciplinary proceeding that could lead to his disbarment, one would think Respondent would do his best to demonstrate his fitness to remain a member of this bar, demonstrate adherence to the highest standards of the profession, and clearly demonstrate respect for the role of the trial judge.

Yet, having reviewed his filings, it is evident Respondent harbors a disrespect for the institutional role of the judge. This disrespect is so ingrained and deep-seated that Respondent seems unable to realize its full extent, and he expresses it in ways that are clearly detrimental to himself. Respondent's unfortunate attitude of disrespect has no bearing on the question of whether Respondent violated Local Rule 83.7, but it is highly relevant in considering the appropriate reaction of this Court in light of the likelihood Respondent would repeat similarly unprofessional and disruptive behavior in the future.

Respondent filed a multitude of motions and other submissions in this matter. Many of them were frivolous in that they were devoid of any legal or factual support for his asserted position;[56] appeared not to have been presented for any proper purpose; and appeared to have been filed solely for the purpose of unnecessarily

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56 Tennessee Rules of Professional Conduct, Rule 3.1 provides: "A lawyer shall not bring or defend or continue with the prosecution or defense of a proceedings, or assert or controvert or continue to assert or controvert an issue therein, unless after reasonable inquiry the lawyer has a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law."

delaying and prolonging these proceedings.[57] The extremely high number of such motions and filings compels the Court to conclude they were vexatious.[58] Moreover, the Court concludes many of these motions or filings were filed in bad faith. For illustrative purposes, the Court will discuss some of Respondent's motions. By discussing these particular motions, the Court is not suggesting that other motions and filings were proper.

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57 Tennessee Rules of Professional Conduct, Rule 3.2 provides: "A lawyer shall make reasonable efforts to expedite litigation."

58 Although this is not a civil case, Rule 11 of the Federal Rules of Civil Procedure does provide additional guidance for the expectations placed on attorneys practicing in federal court. Rule 11 provides in pertinent part:

By presenting to the court a pleading, written motion, or other paper--whether by signing, filing, submitting, or later advocating it--an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

1. Motion for Relief From Notification Provision of January 17, 2008 Show Cause Order (Court File No. 3)

In this motion, filed just before his substantive response was due, Respondent sought to have the Court remove and reconsider the provision of the Show Cause Order that Respondent notify the judicial officers in this district, before whom he had pending cases, of the initiation of this action. Respondent mischaracterized the Court's order as requiring an ex parte communication with judges of this court. Respondent also argued the notification to the other judges would be "the equivalent of the publication to these Districts (sic) judicial officers of the proceedings contrary to the confidentiality provisions of EDTN (sic) Local Rule 83.7."[59] Respondent mischaracterized a notice to a judge of a pending disciplinary action as a communication regarding the merits of the case before the judge. Finally, Respondent failed to recognize or mention that the very provision of the local rule providing for confidentiality explicitly states the court can order disclosure. Respondent offered no legal authority nor logic for his request.

Respondent's motion is disrespectful, dismissive, and baseless. First and foremost, Respondent was ordered to inform the other judges, before whom he had pending cases, in the Show Cause Order, issued on January 17, 2008 (Court File No. 1). This Court assumed Respondent would promptly obey the Court's order. Instead, Respondent filed a motion eighteen days later, asserting

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[59] That the confidentiality provisions of the Local Rule are designed to protect the attorney subject to disciplinary action is clearly demonstrated by this effort of Respondent to benefit from the protections afforded by these provisions. To prevent even other judges of this court from knowing of the initiation of this action, Respondent sought refuge in the confidentiality provisions.

baseless and misinformed reasons why he believed he did not have to inform the other judges (*see* Court File No. 3). This is a perfect example of Respondent's complete lack of appreciation for how to conduct himself before this Court - a Court order, ordering an attorney to do something, is not the first round of negotiations nor is it an invitation for an argument.

In denying the grounds put forth in Respondent's motion, the Court characterized the motion as specious, an extremely harsh appellation that is rarely used by this Court. Respondent's arguments were completely baseless (*see* Court File No. 5, pp. 3-4). First, Respondent ignored that the judges he should have notified are all judges of this court and thus constitute the court itself. The judges of this court are not foreign bodies, so Respondent was not ordered to notify any third parties outside of the confidentiality envisioned by the local rules.

Second, this demonstrates the inconsistency Respondent so often exhibits in his dealings with the court.[60] Later, in his Exceptions to Magistrate Judge Lee's Recommendations, Respondent takes issue with the confidentiality of the proceedings, prior to removal of the confidentiality immediately following Respondent's submission of a signed waiver of confidentiality [*791] (Court File No. 68, pp. 4-5). Yet, in this earlier motion, Respondent not only did not ask for that confidentiality to be waived, but also improperly attempted to use the confidentiality of the disciplinary proceedings to justify

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60 The Show Cause Order references another example (Court File No. 1, p. 2), which was also raised by Judge Greer. Throughout the November 17 hearing, Moncier repeatedly requested the Court to perform an inquiry or to permit Vassar to address the Court, which makes Moncier's assertions that he "had no idea" why the Court was inquiring of Vassar even more baffling.

See Moncier II, 2007 U.S. Dist. LEXIS 39206, 2007 WL 1577718 at *5 n.7

disobeying an order of this Court. Aside from the unprofessional and potentially unethical nature of such contradictory posturing, such behavior leaves courts at a loss as to what position Respondent maintains at any given time.

In considering the lack of merit of this motion along with the other motions and submissions filed subsequently, the Court finds this motion was filed in bad faith and is frivolous. It was not filed for any proper purpose or supported by any legal basis, but rather was filed for the purpose of causing unnecessary delay[61] and prolonging these proceedings.

Even when the Court pointed out the lack of merit of this motion, Respondent did not move to withdraw the motion nor did he apologize for filing it.

2. Motion for Disclosures (Court File No. 4)

In this motion, Respondent sought information from the Court regarding "communication ... received other than from the pleadings and proceedings on January 9, 2008, pertaining to the Show Cause Order in this matter or the case of [Lee Almany]." This motion is bizarre and largely incomprehensible. Respondent was inarticulate and unclear as to what he was seeking and what relevance it had to the Show Cause Order. Furthermore, Respondent did not cite any legal authority for his request, obviously because there is no legal authority which permits Respondent's request.

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61 On the same day Respondent filed this motion, he also filed his Motion For Extension (Court File No. 2). In this motion, Respondent asked for an additional twenty days after the Court acted on his motions to file his required response to the Show Cause Order. By not filing his response in a timely fashion and by filing these non-meritorious motions, Respondent achieved his purpose in delaying his response without ever obtaining court approval for the delay.

Regardless of the purpose of Respondent's desired search, it is abundantly clear Respondent had no authority to take discovery of a judicial officer presiding over a proceeding involving him personally. If litigants were permitted to engage the presiding judicial officer in a proceeding in discovery, the judicial officer could not perform his or her responsibilities. This is another indication of the disrespect Respondent harbors for the institutional role of the judge, a disrespect to which Judge Greer also alluded. *See Moncier II,* 2007 U.S. Dist. LEXIS 39206, 2007 WL 1577718 at *9, *10; *Moncier I,* 2007 U.S. Dist. LEXIS 302007 WL 1206731 at *3.

Respondent's request for information concerning Mr. Almany is confusing; Respondent was not serving as counsel in the case and ethically could not have a professional relationship with Mr. Almany.[62] As such, the events of Mr. Almany's case were of no concern to Respondent, nor did Respondent have any standing to raise any issue regarding Mr. Almany.

It is also peculiar and rather troubling that Respondent then proceeded to accuse [*792] district judges of talking about him, with a lingering insinuation that discussions between district judges are somehow inherently nefarious. "Respondent has received reports that Senior Judge Leon Jordan and deceased Senior

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62 Respondent had represented Mr. Almany in a criminal proceeding. *See United States v. Almany,* No. 1:08-cr-1, formerly No. 2:07-cr-88 (E.D. Tenn. filed Sept. 11, 2007). After conducting an evidentiary hearing, the Court determined that Respondent labored under a conflict of interest and his continued representation of Mr. Almany would detract from the public perception of the integrity of the federal judicial system. Therefore, the Court disqualified Respondent and ordered him and his firm to have no further professional contact with Mr. Almany. Mr. Almany was appointed a very experienced, competent, and conflict-free counsel. Mr. Almany has subsequently entered a plea of guilty.

Judge James Jarvis[63] had conferences with Judge Greer after November 17, 2006 pertaining to Respondent's contempt of court charges and potential disciplinary action." (Court File No. 4, unnumbered p. 4). Respondent does not favor us with the sources of these reports, nor does Respondent provide any detail as to why he believes any conversations, if they occurred, were somehow improper or even germane to these proceedings.[64] As is evident from this and other filings, Respondent seems to believe that vague, unfounded attacks on the judiciary somehow make Respondent's misconduct more acceptable or less deserving of sanction.

This is another motion that lacks any legal basis.

In considering the lack of merit of this motion, along with the other motions and submissions filed subsequently, the Court finds this motion was filed in bad faith and was frivolous. It was not filed for any proper purpose or supported by any legal basis, but rather was filed for the purposes of causing unnecessary delay and prolonging these proceedings.

3. Motion to Dismiss Without Prejudice (Court File No. 5)

Respondent moved the Court to dismiss the Show Cause Order. The basis for this motion was Respondent's contention the Eastern District of

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[63] Senior Judge Jordan is resident in the Knoxville Division of this District, as was Senior Judge Jarvis, who has since passed away.

[64] Based upon the contents of Respondent's motion, Respondent appears to be insinuating that something sinister and nefarious took place between these judges. Had he stated his insinuation explicitly, this Court would have needed to further inquire into what would have been yet more unprofessional, unethical misconduct.

Tennessee has no authority to discipline members of its bar, because it somehow delegated that authority to the state of Tennessee. Respondent cited absolutely no authority for this incredible assertion. Respondent also failed to cite any of the abundant and readily available authority conclusively demonstrating the court has such authority.[65] Respondent ignores he was admitted to the bar of this court by the judges of the Eastern District of Tennessee, not by the Tennessee Board of Professional Responsibility. By filing a motion in federal court, the attorney has an obligation to refrain from filing matters without a legal basis. This is the case here. The Court can only conclude Respondent's purpose was to delay and prolong these proceedings, and this motion was filed in bad faith.

Respondent also represents he made a report to the Tennessee Board of Professional Responsibility and that Board has under consideration some matters pertaining to Respondent. The Court assumes Respondent has made some type of report to the Board, but the Court has no way of knowing precisely what matters are before the Board of Professional Responsibility. [*793] In so far as the record shows, Respondent has not sought to make whatever is before the Board public.

However, even if the Board is considering some matters that may coincide with the allegations in the Show Cause Order, as the Court said in the Order disposing of this motion, "[w]hether Respondent violated the Tennessee Rules or Professional Conduct while practicing law in a federal court in the Eastern District

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65 This ethical failure on the part of Respondent to bring to a judge's attention contrary authority is not new. Judge Greer, in discussing allegations by Respondent that he was biased, remarked that certain statements relied upon by Respondent "concern[ed] such things as [Respondent's] ethical obligation to call to the Court's attention precedent contrary to his stated position ...." *Moncier I*, 2007 U.S. Dist. LEXIS 30241, 2007 WL 1206731 at *3.

of Tennessee, and whether his conduct brought the federal court into disrepute are concerns of the utmost importance to *this* Court" (Court File No. 6, p. 2). This Court has a superior and paramount interest in matters pertaining to a member of its bar and proceeds accordingly.

Respondent also alleges Judge Greer "filed with the BOPR a complaint against Respondent that includes the very conduct that is the subject of this Court's Show Cause Order" (Court File No. 5, pp. 2-3.) The Court also does not know whether this is true,[66] but again, this Court has a fundamental interest in regulating its own bar and the behavior of its members.

4. Motion for Hearing and for Authority to Issue Subpoenas (Court File No. 9)

In this motion, Respondent made his request, albeit late, pursuant to Local Rule 83.7(d)(4), for a hearing on the Show Cause Order. Respondent also sought authorization to issue subpoenas to a number of individuals, including: United States District Judges Thomas Varlan and J. Ronnie Greer, several state court judges, and counsel for the Tennessee Board of Professional Responsibility. Respondent wanted testimony from these individuals to establish he did not engage in unprofessional conduct in proceedings before them and that there have not been previous complaints made to the Board of Professional Responsibility regarding "conduct similar to the conduct cited in the show cause."

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[66] Judge Greer, in addressing an accusation by Respondent that Judge Greer referred charges against Respondent to the Tennessee Board of Professional Responsibility, noted that he merely "provided information to the Board concerning Mr. Moncier's conduct in this Court." *United States v. Almany*, 2008 U.S. Dist. LEXIS 407, 2008 WL 56024, * 1 n.3 (E.D. Tenn. Jan. 2, 2008).

Magistrate Judge Lee properly denied this motion as it did not claim these witnesses, except for Judge Greer, possessed any information or would be asked to testify about anything pertaining to the subject matter of the Show Cause Order (Court File No. 12, p. 4). With respect to testimony from Judge Greer, Magistrate Judge Lee clarified that the transcript of the November 17, 2006 hearing would be available at the hearing, judges speak through their opinions, and Judge Greer had issued one (*id.*).

Asking to subpoena witnesses with no pertinent information was a burden on the court and served no purpose other than to delay these proceedings.

5. Motion for Jury Trial (Court File No. 16)

Respondent filed a demand for a jury trial. Commendably, he did admit he had no law to support the demand. "Respondent does not have a case holding there is a right to a jury trial on a Court Show Cause Order ...." (Court File No. 16, unnumbered p. 2). While it is commendable that in this instance, as opposed to many others, Respondent admitted no legal authority supports his position, it is not commendable that Respondent still failed to acknowledge the unanimity in the case law directly rejecting his position. *See, e.g., Matter of Jacobs,* 44 F.3d 84, 89 (2nd Cir. 1994) (rejecting the argument that an attorney facing disciplinary proceedings has a right to a jury trial and other federal constitutional protections for criminal prosecution under the Fifth, Sixth, Seventh, and Eighth Amendments); *In re Smith,* 123 F. Supp. 2d 351, 354 (N.D. Tex. 2000) (rejecting the contention an attorney facing a disciplinary hearing is entitled under the Sixth Amendment to a jury trial or full evidentiary hearing); *In re Lehtinen,* 332 B.R. 404, 413 (B.A.P. 9th Cir. 2005) ("An attorney subject to disciplinary action is not entitled to the presumption of innocence, the 'beyond a

reasonable doubt' burden of proof, confrontation [*794] of witness, or a jury trial.") (citation omitted).

Respondent did not cite any of the cases above, or any of the numerous others which explicitly state there is no right in attorney disciplinary hearings to a jury trial. These cases are not difficult to locate. Respondent was obligated ethically to bring these cases to the Court's attention. Respondent failed to do so.

Respondent has no legal basis for this demand. It is yet another frivolous filing.

In considering the lack of merit of this motion along with the other motions and submissions filed previously and subsequently, the Court finds this motion was filed in bad faith and is frivolous. It was not filed for any proper purpose or supported by any legal basis, but rather was filed for the purpose of causing unnecessary delay, and prolonging these proceedings.

6. Objections and Motion to Revise (Court File No. 17)

Respondent here objected to the clarification provided by the Court and Magistrate Judge Lee that the hearing, in determining whether a violation occurred, would address only the conduct set out in the Show Cause Order. Respondent objected to being constrained to addressing only the accuracy of the factual allegations in the Show Cause Order, rather than being give free reign to discuss a litany of irrelevant events, unfounded accusations, and vague conspiracy theories as part of yet another strategy to delay the proceedings. Respondent then asked that the hearing be conducted in accordance with Local Rule 83.7, which is precisely what occurred.

There was no purpose served by this motion other than to waste the Court's time and resources.

7. Motion to Abstain (Court File No. 18)

In yet another attempt to delay the proceedings, Respondent moved the Court to stay any determinations of this matter until the Sixth Circuit court acts on his appeal of his criminal contempt conviction.[67] [37] Respondent incorrectly stated the Sixth Circuit will consider and resolve some of the issues presented in this case. This is not true. The Sixth Circuit is considering a criminal matter. While the underlying conduct may overlap to some degree in the criminal conviction and in this disciplinary proceeding, the issues are distinct. The Sixth Circuit is not considering whether [**79] Respondent engaged in unethical conduct that tends to bring the court and the bar into disrepute. Nor is the Sixth Circuit considering whether Respondent, by interrupting Judge Greer and threatening to abandon a client, engaged in unethical conduct that tends to bring the court and the bar into disrepute. Furthermore, the Sixth Circuit is not considering whether Respondent violated any of the provisions [*795] of the Tennessee Rules of Professional Conduct.

Magistrate Judge Lee correctly denied this motion (Court File No. 23, pp. 2-3). This motion was not brought in good faith, and the Court finds it was filed for the purpose of unnecessarily delaying these proceedings.

8. Objections to February 11, 2008 Order (Court File No. 19)

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67 Such motions by attorneys facing disciplinary action in federal courts are not unusual. *See, e.g., In re Peters,* -- F.Supp.2d --, 2008 U.S. Dist. LEXIS 29454, 2008 WL 1000131 at *3 (An attorney facing disciplinary action filed submissions disputing charges on the merits by asserting that the underlying proceedings were improper, unfair, biased and lacking in due process. Attorney also argued that, since an appeal was pending before a court of appeals, no action should be taken until the appeal was complete.)

Respondent in this filing again sought discovery from a judicial officer presiding over his case. Respondent sought from Magistrate Judge Lee disclosure of "all communications the Court has had (sic) received from Chief Judge Collier; any other Judge; from any investigation conducted by this Court to date; or from any other person pertaining to Respondents case." Respondent provides no legal authority for such a motion, nor any reasonable explanation for why such an extraordinary request would be seriously considered.

Permitting a litigant to pursue discovery from the presiding judicial officer in a litigant's case would detract from and make impossible the institutional role that the officer must perform. Discovery is subject to great abuse and would quickly descend into disputes over the discovery itself, instead of the merits of the proceedings.

This motion was improper and demonstrates disrespect for the institutional role of judge.

9. Objection and Motion to Disqualify a Court Subordinate to the Complainant, Chief Judge Collier (Court File No. 21)

Respondent, targeting Magistrate Judge Lee, "move[d] to disqualify, this Court, and any Court that subornate (sic) to, or under the supervision of, the EDTN LR "complainant' who, in this case is Chief Judge Curtis Collier" (Court File No. 21, unnumbered p. 1). Respondent based this motion upon his mistaken assertion that "Chief Judge Curtis Collier is the Complaintant (sic) in this case" (*id.*). As explained earlier, there is no complainant in this case, as it is defined in the Local Rules. See E.D.TN. LR 83.7(b). Respondent's argument is a mischaracterization of the local rules.

Respondent also erroneously referred to the conduct described in the Show Cause Order as "Chief Judge

Collier's opinions and conclusions" (Court File No. 21, unnumbered p. 2). Again, Respondent mischaracterized the local rules and the proceedings. The Show Cause Order is issued to provide an attorney the opportunity to deny, correct, or explain the content of the Show Cause Order *prior* to any conclusions being made. Respondent's argument is either recklessly uninformed or purposefully disrespectful to the court and the proceedings.

Respondent then challenged the permissibility of Magistrate Judge Lee serving as the judicial officer in the proceedings, despite that her doing so is in conformity with E.D.TN. LR 83.7(g). Respondent cites [**82] several federal statutes, none of which is applicable to the proceedings here.

Magistrate Judge Lee properly denied this motion (Court File No. 23, p. 6). It was without any legal basis or factual foundation, and was not filed for any proper purpose.

10. "Motion to Dismiss the Show Cause Order for Failure to Comply with EDTN LR 83.7(b)" (Court File No. 24)

In this motion, Respondent again falsely asserts this Court is the complainant in the case within the terms of Local Rule 83.7. As explained earlier in this memorandum and as is clear from a reading of the rule itself, a complainant, pursuant to Local Rule 83.7(b), [*796] is a party to an action or counsel to a party to an action. No party or counsel filed a complaint in this proceeding. Therefore, there is no complainant. *See* E.D.TN. LR 83.7(b). Respondent's motion is without foundation and was properly denied by Magistrate Judge Lee (Court File No. 29).

In considering the lack of merit of this motion along with the other motions and submissions filed previously and subsequently, the Court finds this motion was filed

in bad faith and is frivolous. It was not filed for any proper purpose or supported by any legal basis, but rather was filed for the purpose of causing unnecessary delay, and prolonging these proceedings.

11. "Motion for EDTN LR 83.7(h)(1) Minimum of Twenty Days For The Hearing" (Court File No. 27)

After Respondent successfully delayed the filing of his response and delayed the date for a hearing through his tactics of frivolous filing, Respondent asked for an additional twenty days from his receipt of Magistrate Judge Lee's February 27, 2008 order. Magistrate Judge Lee properly denied this motion (Court File No. 29, pp. 3-4). This motion was just another indication of the efforts of Respondent to delay and prolong this disciplinary matter.

12. Respondent Sought Stay in Sixth Circuit

In yet another effort to delay and sidetrack these proceedings, Respondent filed a motion in his appeal of his criminal contempt conviction, seeking a stay from the Sixth Circuit court of these disciplinary proceedings, despite the fact that neither the final disposition of his appeal nor the final disposition of these proceedings would have any impact on the other. His motion was rejected by the Sixth Circuit on the same day it was filed (Court File No. 65, p. 4 n.3).

13. Declarations Filed in Support of Respondent (Court File No. 35)

Respondent filed a large number of affidavits, which he calls declarations, on his behalf that largely amount to character references. Magistrate Judge Lee commented on these in her Recommendation (Court File No. 65, pp. 36 - 38). Magistrate Judge Lee accurately summarized the contents of these declarations. The Court has given these character references the appropriate weight they deserve. However, the Court finds it necessary to comment further on two of the

submissions, those of Ann Short Bowers and Bethany Dumas.

The Court first addresses the submission of Ann Short Bowers (Court File No. 37). The Court is unable to give any credence to Ms. Bowers' declaration. First, Ms. Bowers confines her opinion to the Tennessee Code of Professional Conduct and completely ignores this court's requirement that attorneys not engage in unethical conduct that tends to bring the court or the bar into disrepute, E.D.TN. LR 83.7(a).[68] Since she completely ignores one of the two standards this court uses for measuring an attorney's conduct, her ultimate opinion as to whether Respondent is fit to remain a member of this bar or whether his conduct warrants discipline is meaningless.

Second, the Court has difficulty accepting Ms. Bowers opinion because she bases [*797] it in part on factual assertions that are completely false. Ms. Bowers says the Court relied upon the superceded Tennessee Code of Professional Responsibility. This is simply false and, equally disconcerting, is without any recognizable foundation, because Ms. Bowers was not in the room when the Court penned the Show Cause Order; she did not contact the Court to inquire whether the outdated Code was used; and nothing in the Show Cause Order indicated the outdated Code was used. The Court finds it impossible to seriously credit the testimony of a person who based her opinion on unexplained and

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[68] Ms. Bowers, in addition to failing to consider the prong for unethical conduct of the court's local rule, also failed to consider the generally recognized standards of ethical and professional behavior in this district; failed to consider or address any of the many federal cases cited in this opinion that define as unethical and unprofessional conduct the very conduct in which Respondent engaged; and failed to consider the ethical and professional standards adopted by the American Bar Association, the American College of Trial Lawyers, and other similar professional organizations.

inaccurate suppositions. Respondent should not have submitted this affidavit with this assertion. A casual review of the filing should have shown that Ms. Bowers had no basis for such a statement. It was at a minimum reckless on the part of Respondent to have filed her affidavit containing this false assertion.

Ms. Bowers also includes in her affidavit an assertion this Court filed a complaint against former attorney Edward Slavin[69] with the Board of Professional Responsibility (Court File No. 37, unnumbered pp. 4-5). (Mr. Slavin was not a member of the bar of the Eastern District of Tennessee.) This assertion is also false. However, the Court is more forgiving here because Ms. Bowers may have obtained that incorrect information from the Board of Professional Responsibility. The fact is, however, this Court has never made a complaint against anyone to the Board of Professional Responsibility. Again, Ms. Bowers' false assertions and assumptions undermine the entirety of Ms. Bowers' opinion and destroy any credibility one might wish to lend to it.

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[69] Mr. Slavin was a defendant in a civil collection action before this Court several years ago. *Lockheed Martin Energy Systems v. Slavin*, 190 F.R.D. 449 (E.D. Tenn. 1999). Mr. Slavin was also an attorney licensed in Tennessee, but was not a member of the bar of the Eastern District of Tennessee. This Court found Mr. Slavin had violated Rule 11 of the Federal Rules of Civil Procedure due to the nature and content of some of his filings. The Court ordered the Clerk of Court to forward its opinion to the Tennessee Board of Professional Responsibility for its information. 190 F.R.D. at 461. However, this was not a complaint and the Court did not have any direct contact with the Board of Professional Responsibility seeking the initiation of any disciplinary action against Mr. Slavin. To give Ms. Bowers the benefit of the doubt, however, the Court is aware that sometimes the Board of Professional Responsibility erroneously lists judges that merely provide information as having filed a complaint. Mr. Slavin was later disbarred by the Tennessee Supreme Court.

Last, Ms. Bowers bases her opinion upon the practice of attorneys in Tennessee courts and not members of the bar of the Eastern District of Tennessee. A great number of the members of the bar of this court are not Tennessee attorneys. By confining herself solely to Tennessee attorneys, Ms. Bowers ignores the practice of a large number of the members of this bar who are not licensed to practice in Tennessee state courts. Since this Court has been Chief Judge, Ms. Bowers has never engaged the court in a discussion of the applicable standards for attorneys who are members of the bar of this court. Nor has she ever been involved in a disciplinary proceeding conducted under Local Rule 83.7 while this Court has been Chief Judge. Assuming one could overcome the other problems with her opinion, her affidavit may have been more credible if she had been involved in some manner in acquainting herself with the applicable standards and expectations required of attorneys admitted to this bar. As a result, Ms. Bowers' opinion is not relevant and of no benefit to this Court.

The Court also is compelled to comment on the submission of Bethany Dumas [*798] (Court File No. 36), because it is so outlandish. Ms. Dumas is represented by Respondent to be a linguistics expert. Ms. Dumas offers her opinion that, based upon her reading of the transcript of the November 2006 hearing, it "reflects consensual dialog, including debate and argument, between Mr. Moncier and Judge Greer" (*id.*, p. 4). She goes on to say she finds "nothing in the transcript that supports an opinion that Mr. Moncier intended or demonstrated disrespect to Judge Greer or that Judge Greer intended or demonstrated disrespect to Mr. Moncier" (*id.*). Both of these statements are ludicrous. If we are to believe these statements, then Respondent's actions in speech and demeanor to Judge Greer at the hearing were respectful, dignified, pleasant, consensual, and professional. She offers this incredible opinion after reading the Show Cause Order

and the transcript (*id.*, p. 2). From her affidavit, the Court can see that she is a highly educated individual. However, Ms. Dumas's opinion is so devoid of belief and is such a departure from reality that to call it incredible is to be charitable. If we accept Ms. Dumas's opinion, a judge on the bench of this court, a highly respected and experienced judge, after engaging in an allegedly respectful, dignified, pleasant, consensual, and professional dialogue with a member of the bar of this court in a proceeding, for some unexplained reason, then suddenly had the attorney summarily arrested and taken into custody; personally charged the attorney with a federal criminal offense (based, apparently, on no offending conduct whatsoever); and referred the charges to the local United States Attorney's office. That office, upon receipt of and review of the charges, decided to prosecute the charges (even though they knew those charges were based on respectful conduct, since representatives of that office were present in the courtroom during the conduct, and despite the fact that the United States Attorney has no obligation whatsoever to prosecute contempt of court charges initiated by a judge). Then, at a public trial of the matter, the same judge found the non-offending attorney guilty of the criminal charges by proof beyond a reasonable doubt; imposed a criminal sentence of probation and ordered the non-offending attorney to pay a fine; and issued a written opinion setting out facts characterizing the conduct as disrespectful and unprofessional, knowing that representation to be false. Such a scenario is woefully beyond belief.

The Court does not intend to mock Ms. Dumas, but must point out the utter absurdity of her opinion in light of the surrounding circumstances, of which the Court can only assume Ms. Dumas was unaware. Ms. Dumas,

as a law school graduate[70] and resident of Knoxville, seemingly would have heard or read of an attorney in her local community being arrested, jailed, and later convicted of criminal contempt - for thankfully, such an event is extremely unusual. Yet her opinions indicate otherwise. Ms. Dumas does confess ignorance of Judge Greer's opinion. She also asserts the opinions of Judge Greer and Respondent, as first-hand witnesses to the conduct, prevail over hers (*id.*, p. 2). It is with this ignorance, her own recognition of the limitations on the relevance of her own opinions, and an apparent lack of knowledge as to the courtroom conduct of a judge and professional attorneys, that Ms. Dumas must have arrived at her incredible conclusions. [71]

[*799] However, the Court cannot be as charitable to Respondent. Respondent was in the Courtroom and knew what Judge Greer's reaction was. Respondent

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[70] Ms. Dumas's resume does not indicate she has ever practiced as an attorney or is or has been admitted to a bar (*see* Court File No. 36, Attachment 1).

[71] Nevertheless, Ms. Dumas did find someone worthy of blame in the hearing - Judge Greer. "Judge Greer was the controlling party in the communication. At any point, Judge Greer had authority to terminate the communication and rule. Judge Greer did not terminate the communication." (Court File No. 36, pp. 4-5). This parrots Respondent's casting of blame on Judge Greer. In his Response, Respondent stated: "Respondent avers and evidence will be presented at a hearing that Judge Greer, after Respondent asked if he could speak to his client, could have either ordered Respondent, (sic) out of the courtroom or ordered counsel placed in jail, and then completed his questioning of Vassar and thereafter conducted the sentencing hearing so that there was no actual obstruction of justice[.]" (Court File No. 13, p. 16, Response I, P 65.) In Respondent's testimony he stated: "Judge Greer could have said, 'No, you may not speak to your client,' or Judge Greer could have said, 'Yes, you can speak to your client,' and it would have ended." Tr. 161. It is left to the imagination as to why Respondent believes Judge Greer was required to permit and accommodate Respondent's unprofessional and unethical behavior.

knew Judge Greer gave him a direct order. Respondent knew Judge Greer had him arrested. In his remarks at the hearing before Magistrate Judge Lee, Respondent admitted he knew Judge Greer was offended by Respondent's behavior. "However, it was obvious to me at that point in time that I had offended District Judge Greer." Tr. 31. Respondent knew Judge Greer found him guilty after a trial.

Counsel for Respondent and Respondent himself have a responsibility to not submit false or misleading evidence to the Court. If Respondent actually wanted the Court to accept Ms. Dumas's opinion, then the Court would be the victim of a fraud. Submission of this affidavit shows a contempt for the truth and an utter disregard for honesty. If Respondent did not want the Court to accept Ms. Dumas's opinion as truth, but rather submitted it for some other reason, then Counsel for Respondent and Respondent submitted a frivolous document to the Court without any factual or legal basis to support it. The Court had to expend its scarce time and resources to read this declaration. A submission such as this, which is not only devoid of a factual basis, but relies upon an utterly false and incredible basis, should never be submitted in a court of law. This Court expects and, for the sake of the proper operation of justice, must demand much better from attorneys practicing before it.

The Court feels compelled to address one final issue relating to Ms. Dumas's affidavit. Ms. Dumas writes "... the question of whether Judge Collier would or could have handled the communication differently is immaterial" (*id.*, p. 5, P 16).[72] If it were in her expertise

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[72] This statement is fundamentally flawed in its accuracy because, as previously discussed, the Show Cause Order is not a statement of opinion, but rather a statement of events based upon the evidence already possessed by the Court, which then allows an

and relevant to the issue before the Court, it would be appropriate for Ms. Dumas to postulate that judges might differ as to their reaction to Respondent's pattern of repeated interruptions. However, there is no reason to interject this Court personally into Ms. Dumas's hypothetical; Ms. Dumas's statement implies this Court, sitting as an impartial entity, is somehow a litigating party in this matter. The Court again assumes this is a result of Ms. Dumas's ignorance of the legal system, but remains troubled Counsel for Respondent did not review this before it was submitted, counsel Ms. Dumas on the impropriety of this language, and have it deleted.

Ultimately, submitting Ms. Dumas's declaration is yet another demonstration of the contempt and disrespect Respondent has for the institutional role of the judge.

VI. FACTUAL ACCURACY OF SHOW CAUSE ORDER ESTABLISHED

The Court agrees with and accepts Magistrate Judge Lee's findings that the factual allegations in the Show Cause Order are accurate and are largely undisputed (Court File No. 65). The Court has considered Respondent's Exceptions to the Recommendation and makes the following specific findings. These findings are consistent with, but independent of, Magistrate Judge Lee's findings. The Court will limit its discussion to just the allegations that Respondent interrupted and talked over Judge Greer, threatened to abandon his client, and disobeyed a direct order of Judge Greer. While the Court finds Respondent did accuse opposing counsel of involvement in a conspiracy against him, and this conduct is unethical and unprofessional conduct, the

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attorney to respond to the accuracy or inaccuracy of that statement and the supporting evidence.

Court will not discuss this allegation further to any significant extent.[73]

The Court will also consider the factual findings, both explicit and implicit, made by Judge Greer in connection with the November 2006 hearing. Those findings have preclusive effect and, even if they did not, the Court would accord substantial deference to his findings. *In re Peters,* -- F. Supp. 2d --, 2008 U.S. Dist. LEXIS 29454, 2008 WL 1000131 at *3 ("Such findings are commonly given preclusive effect in subsequent disciplinary proceedings."), 2008 U.S. Dist. LEXIS 29454, [WL] at *4 ("Moreover, even if collateral estoppel were inapplicable here, this [Disciplinary] Committee routinely accords substantial deference to the factual

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[73] Respondent admitted he accused opposing counsel of being involved in a conspiracy against him, although at the hearing before Magistrate Judge Lee, he disputes using the word conspiracy. He does admit he accused the prosecution of improper behavior and making a concerted effort to damage him. Tr. 183 - 88. In contrast to his testimony at the hearing, in his response to the Show Cause Order regarding the same alleged statement, Respondent says, "Respondent avers and will offer evidence at a hearing that Respondent had a reasonable basis to make the statements cited in the Show Cause Order pertaining to AUSA Smith and the prosecution team in Greeneville Division (sic) of this Court." (Court File No. 13, p. 18, Response IV, P 5). "Respondent avers and will offer evidence at a hearing that to date Respondent has not been allowed access to information and documents necessary to litigate the bias that has developed against Respondent in the Greeneville Division of this Court (sic)." (*id.*, p. 19, Response IV, P 7). This is also unethical and unprofessional behavior. "A charge of impropriety by one lawyer against another in the course of litigation should never be made except when relevant to the issues of the case ...." American College of Trial Lawyers, Code of Trial Conduct, P 13(e). However, in light of the Court's disposition of the other three findings of misconduct, the Court will officially reprimand Respondent for his unethical and unprofessional behavior in this regard. It is expected of members of the bar of this court that they will conduct themselves in a professional and civil manner and not violate the ethical standards of this district by engaging in such conduct.

findings of the court that heard the evidence, for much the same reasons that an appellate court gives such deference, i.e., that the court that hears the evidence is in the best position to assess credibility.").

A. Respondent committed alleged violations

1. Allegation Respondent interrupted the court

In his response, Respondent admits "the transcript reflect [sic] uncompleted sentences by both the District Judge and Respondent" (Court File No. 13, p. 17, Response III, P 4). In his testimony before Magistrate Judge Lee, Respondent admitted he did interrupt Judge Greer. Tr. 168-74. Respondent asserts he did not intend to be disrespectful with his interruptions. "I did not believe that there was any disrespectful or intentional interruptions by me of Judge Greer when he was [*801] speaking, nor, other than him having control of the proceedings, did I take the 20 times that double dashes are used when I was speaking to be disrespectful to me." Tr. 168.

Judge Greer also made a finding that Respondent interrupted and talked over him. In his opinion Judge Greer said:

> It is unlikely that this Court, and most other courts, would have taken the extraordinary step of citing Moncier for contempt if the incident of November 17 had been an isolated one. It was not, however. The transcript of the November 17 hearing establishes that Moncier had interrupted the Court no fewer than 14 times during the November 17 proceedings before the Court's order to Moncier to say not one more word.

Moncier II, 2007 U.S. Dist. LEXIS 39206, 2007 WL 1577718 at *3 (footnote omitted).

Magistrate Judge Lee found he had interrupted Judge Greer: "The allegation Respondent repeatedly interrupted the court is established in the transcript" (Court File No. 65, p. 42).

Respondent in his Exceptions does not challenge this finding (*see* Court File No. 68).

This is an opportunity for this Court to clearly state on behalf of all the judicial officers of this court that, absent an emergency such as a fire or safety issue, it is never proper or acceptable conduct for an attorney to interrupt a presiding judge in a proceeding while that judge is speaking. In this district, such conduct is considered unprofessional behavior. And if repeated instances of such professional misconduct take place in a proceeding as is the case here, then such conduct is sanctionable. *See United States v. Wittig*, 2005 U.S. Dist. LEXIS 5736, 2005 WL 758606, *6-7 (D. Kan. Apr. 4, 2005). A judge may not take offense at the interruption, may excuse it, and may even invite an interruption, but for an attorney to interrupt a judge, even in such circumstances, is unprofessional. [74]

Based upon Respondent's admission of the factual accuracy of this allegation, the transcript of the proceeding, and Judge Greer's findings, the Court finds

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[74] Respondent also stated during his disciplinary hearing that he did not believe it disrespectful when Judge Greer interrupted him. Tr. 168. It should be clarified that, although the judges of this district do their utmost to show respect to the attorneys practicing before them and to treat them as professionals, it is not an issue whether a judge interrupts an attorney. A judge is charged with maintaining order in the courtroom and is responsible for the progression of the proceedings. A judge may interrupt any party at any time. If a party takes issue with such interruptions, it does so on appeal. It is never appropriate for a party to challenge the judge for control of the courtroom.

by clear and convincing proof[75] that Respondent engaged in unethical conduct that tended to bring the court and the bar of this court into disrepute.

Further, based upon Respondent's admission of the factual accuracy of this allegation, the transcript of the proceeding, and Judge Greer's findings, the Court finds by clear and convincing proof that Respondent engaged in professional misconduct that violates the Rules of Professional Conduct of Tennessee. Tennessee Rules of Professional Conduct, Rule 3.5(e) provides: "A lawyer shall not: (e) [e]ngage in conduct intended to disrupt a proceeding before or conducted pursuant to the authority of a tribunal." Respondent interrupting and talking over Judge Greer clearly disrupted the proceeding. Judge Greer found Respondent's conduct intentional. *Moncier II,* 2007 U.S. Dist. LEXIS 39206, 2007 WL 1577718 at *7. This Court makes the same finding here. Accordingly, this Court finds Respondent violated Rule 3.5(e).

2. Allegation Respondent threatened to abandon or abandoned client

Respondent in his response admits he threatened to abandon or abandoned a client in the midst of a court proceeding (Court File No. 13, p. 20, Response V, P 2).

In the hearing before Judge Greer, Respondent, after saying he would just sit and remain mute, stated: "I can't provide him a defense." Vasser Tr. pp. 41-42.

In his testimony at the hearing before Magistrate Judge Lee, Respondent admitted he did threaten to abandon his client. Tr. 198. "At one time at the bench, I

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75 The Local Rule requires proof of an attorney's violation by clear and convincing evidence. Magistrate Judge Lee found the violations proven by that standard. However, here, the proof is so substantial that it exceeds that standard and would have satisfied an even higher standard of proof.

said, 'Judge, I might just have to sit here and remain moot."[76] *Id.* While admitting he made the statement, Respondent asserts he never had any intent to actually abandon his client. This does not lessen the unprofessional nature of the comment. It is unethical for an attorney to falsely state he will abandon a client so as to bully or intimidate a judge. This allegation is established. As Magistrate Judge Lee said: "The allegation Respondent threatened to 'sit there and remain moot,' i.e., not provide a defense for his client, due to a potential conflict Respondent perceived is again proven in the transcript" (Court File No. 65, p. 43).

Respondent in his Exceptions does not challenge this finding.

Judge Greer in his opinion also stated Respondent threatened to abandon his client. Respondent's conduct was of such significance Judge Greer thought it merited mention. Judge Greer in footnote 13 of his opinion said:

> So strong was Moncier's determination not to go forward with the sentencing hearing on November 17 that he, at one point, "threatened" to stand mute during the sentencing hearing of his client.

2007 U.S. Dist. LEXIS 39206, 2007 WL 1577718 at *5 n.7.

One of the most basic responsibilities of a member of the bar of this court is to represent clients. Threatening to stand mute during a hearing amounts to abandoning of a client - a total shirking of the attorney's professional obligation. *See United States v. Phifer,* 511 F.2d 960, 962 (4th Cir. 1975) ("[Z]ealous advocacy does not require, nor

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[76] Presumably, the word that was used was "mute" and not "moot."

does the Code of Professional Responsibility permit an attorney to abandon his client and refuse to continue when the court has ruled adversely to his motion. [The attorney] should not have withdrawn from the case and left the courtroom. Nor should he have been permitted so to do. His conduct was quite inexcusable and thoroughly unprofessional."). Respondent's action in this instance was an effort to bully and intimidate the presiding judge into letting Respondent have his way. This is highly unethical conduct and has no place in the legal profession. That Respondent did not carry out his threat does not lessen the violation in the slightest. The presiding judge did not know Respondent would not carry out his unethical threat. *See In re Peters*, -- F.Supp.2d --,2008 U.S. Dist. LEXIS 29454, 2008 WL 1000131 at *6 ("[T]he statements were made in a context in which there was a high likelihood that they would be taken seriously by a young associate, and this, at a minimum, evidences a reckless disregard of the prohibitions of the New York Disciplinary Code."). A judge in the midst of a proceeding faced with a threat by an attorney to abandon a client is put in the predicament of not being able to go ahead with the proceeding, confronting the attorney, or giving in to the attorney's demands. The goal of the presiding judicial officer is to have the proceeding proceed in an orderly fashion to its natural conclusion. [*803] Threats such as this interfere with that goal.

Based upon Respondent's admission of the factual accuracy of this allegation, the transcript of the proceeding, Judge Greer's findings, and Magistrate Judge Lee's findings, the Court finds by clear and convincing proof that Respondent engaged in unethical conduct that tended to bring the court and the bar of this court into disrepute.

Furthermore, based upon Respondent's admission of the factual accuracy of this allegation, the transcript of

the proceeding, Judge Greer's findings, and Magistrate Judge Lee's findings, the Court finds by clear and convincing proof that Respondent engaged in professional misconduct that violates the Rules of Professional Conduct of Tennessee. Tennessee Rules of Professional Conduct, Rule 1.1, in part, provides: "A lawyer shall provide competent representation to a client." Threatening to abandon a client is not competent representation. Respondent violated Rule 1.1. It also amounts to conduct intended to disrupt the proceeding in violation of Rule 3.5(e) and conduct that is prejudicial to the administration of justice in violation of Rule 8.4(d).

3. Allegation Respondent disobeyed the court

In his response, Respondent admits he disobeyed the order of the court (Court File No. 13, p. 24, Response IX, PP 2-3).

In his testimony before Magistrate Judge Lee, Respondent admitted he did disobey Judge Greer's order not to say another word. Tr. 132-38. Respondent admits he heard and understood Judge Greer's order but did not understand it to prohibit him from speaking to his client or speaking to Judge Greer, even though Judge Greer said "one more word and you're going to jail." Respondent also asserts that, by disobeying the order, he did not intend any disrespect. Tr. 144-47.

Magistrate Judge Lee found this factual allegation to be accurate: "The transcript reflects that despite being ordered first to be quiet and then to not say another word and after being warned of the consequences of such action, Respondent interrupted again in direct violation of the court's order." (Court File No. 65, p. 44).

Respondent in his Exceptions does not challenge this finding.

Judge Greer discussed the disobedience in his opinion in this manner:

> On November 17, 2006, Moncier received a direct, unequivocal command for silence and that he not further interrupt the Court's inquiry. The issue in this case is not whether the order was a proper or correct order. Other judges might well disagree with or find improper the order issued by the Court. Regardless, however, Moncier had the duty to obey the Court's order. See *Maness* 419 U.S. at 459 (stating that an order by a court with jurisdiction, particularly during trial, "must be complied with promptly and completely" until reversed). He has not seriously contested the lawfulness of the order or his disobedience of it. This element of the offense is established, beyond a reasonable doubt, from the proof in this case.

Moncier II, 2007 U.S. Dist. LEXIS 39206, 2007 WL 1577718 at *9.

> Moncier's insistence that his duty to his client required his defiance of the Court is misplaced. If this Court acted arbitrarily in commanding silence from Moncier and failed to grant him reasonable opportunity to argue his position to the detriment of his client, then the court of appeals would have reversed. And even if Moncier subjectively believed that his actions were necessary to preserve issues for appellate review (which he has not claimed), such belief does not excuse direct violation of a direct order of the trial judge. 552 F.2d at 507; *Hallinan v. United States,* 182 F.2d 880 (9th Cir.1950), cert.

denied 341 U.S. 952, 71 S. Ct. 1010, 95 L. Ed. 1375 (1951).

2007 U.S. Dist. LEXIS 39206, [WL] at *8.

> Although Moncier argues that he lacked the intent to obstruct justice (discussed below), he has not seriously disputed that his actions on November 17, 2006, had a disruptive effect on the proceedings and resulted in a delay of those proceedings. One point raised by Moncier, however, does bear some discussion here. Moncier has asserted through his testimony at trial and in an affidavit filed in support of his pre-trial motion to dismiss that the Court had no right to question his client (i.e. that Rule 44 did not permit the Court's questions), that he had no idea why the Court was asking the questions (except possibly to "clean up the record") and that his client had communicated to him through eye contact and body language that he wished to talk to him before answering the Court's questions. Such assertions by Moncier lack any credibility.

2007 U.S. Dist. LEXIS 39206, [WL] at *5.

> Respondent in his testimony admitted he did disobey the order of Judge Greer but he stated he did not do so intentionally, he was obligated to disobey the order, and doing so was harmless. Tr. 142-150. This explanation is baseless. No judge on this bench should be subjected to such conduct by a member of the bar.
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> Based upon Respondent's admission of the factual accuracy of this allegation, the transcript of the proceeding, Judge Greer's findings, and Magistrate Judge Lee's findings, the Court finds by clear and convincing proof that Respondent engaged in unethical

conduct that tended to bring the court and the bar of this court into disrepute.

Further, based upon Respondent's admission of the factual accuracy of this allegation, the transcript of the proceeding, Judge Greer's findings, and Magistrate Judge Lee's findings, the Court finds by clear and convincing proof that Respondent engaged in professional misconduct that violates the Rules of Professional Conduct of Tennessee.

Tennessee Rules of Professional Conduct, Rule 8.4, in part, provides: "It is professional misconduct for a lawyer to: (b) [c]ommit a criminal act that reflects adversely on the lawyer's .. fitness as a lawyer ...;(d) [e]ngage in conduct that is prejudicial to the administration of justice; or (g) [k]nowingly fail to comply with a final court order ..." The Court finds Respondent violated Rule 8.4. Respondent's conduct before Judge Greer was a criminal offense.[77] It took place in court during a court proceeding and reflected adversely on Respondent's fitness as a lawyer. Respondent's conduct was prejudicial to the administration of justice and is a knowing failure to obey the order of Judge Greer. Moreover, Respondent's conduct was intended to disrupt the proceeding in violation of Rule 3.5(e).

Judge Greer found: "The record in this case clearly establishes beyond a reasonable doubt that Moncier disobeyed the clear, unequivocal and lawful order of this Court and that he did so with the intent to obstruct the administration of justice and to interfere with the orderly conduct of this Court's proceedings on November 17, [*805] 2006." *Moncier II*, 2007 U.S. Dist. LEXIS

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[77] However, even if Respondent's misconduct did not satisfy the legal requirements for a criminal offense, his misconduct still is in violation of the professional and ethical standards for the federal courts of the Eastern District of Tennessee and would still warrant the same outcome.

39206, 2007 WL 1577718 at *10. The Court agrees with this finding and also concludes Respondent acted knowingly, deliberately, and intentionally.

B. Assessment of Respondent's Misconduct

Having accepted and approved Magistrate Judge Lee's findings that Respondent engaged in unethical behavior and violated the Tennessee Rules of Professional Conduct, and having made a separate determination that Respondent engaged in unethical behavior and violated the Tennessee Rule of Professional Conduct, the Court will turn now to a consideration of what, if any, disciplinary action is appropriate.

If the evidence before the Court involved only interrupting the court or talking over the court and this conduct was isolated, although unprofessional conduct, the Court would consider only a private reprimand or admonition. If the evidence before the Court involved only interrupting the court or talking over the court but was repeated, although unprofessional conduct, the Court would consider a public reprimand or admonition. Respondent's misconduct is much more serious, however. From his own testimony before Magistrate Judge Lee and from Judge Greer's opinion, Respondent has engaged in previous misconduct and has disregarded earlier warnings[78] and efforts to encourage

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[78] Respondent testified he had been reprimanded by Judge Jordan in 2005 (Court File No. 65, p. 32). "Judge Jordan put down an order saying that if he heard about me being disrespectful in - -I don't know whether it was in pleadings or not, to another judge in this district, he would, sua sponte, hold me in contempt of court." Tr. 225 - 28. Judge Jordan would not make such a statement in jest nor without a solid reason. In hindsight, it might have been better for Respondent, this court, and the bar had the Court taken action against Respondent pursuant to Local Rule 83.7 at that time. An official admonition or reprimand, or the possibility of some official sanction, might have demonstrated to him the need for him to raise

him to raise his conduct to the standards required in this district. Threatening to abandon a client is very serious misconduct and disobeying a direct order of a judge is a very serious ethical violation. Respondent's continued disrespect to the institutional role of judge is also very serious. As the Supreme Court said long ago in *Bradley:*

> But on the other hand the obligation which attorneys impliedly assume, if they do not by express declaration take upon themselves, when they are admitted to the bar, is not merely [**112] to be obedient to the Constitution and laws, but to maintain at all times the respect due to courts of justice and judicial officers. This obligation is not discharged by merely observing the rules of courteous demeanor in open court, but it includes abstaining out of court from all insulting language and offensive conduct [*806] toward the judges personally for their judicial acts.

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his conduct to professional standards and might have forestalled his conduct [**113] in November 2006. By not acting on the matter then, it was falsely interpreted by Respondent that his disrespect to the court and misconduct was tolerable. In this same testimony, Respondent says he sent letters to all the other judges of this court, notifying them of Judge Jordan's reprimand. He did this on his own initiative. Apparently, at that time, he saw nothing improper in communicating in writing to the other judges of this court about a disciplinary matter. Tr. 124, 226 (Respondent testified: "[I sent to] all the judges in the Eastern District of Tennessee a response and a request for a hearing on Judge Jordan's disciplinary order of me pursuant to the very rule that we're here under today."). Yet, when ordered by this Court to notify just those judge before whom he had cases, he claims that such an order is improper. His earlier action, notifying judges of Judge Jordan's reprimand, indicates his recent explanation is not honest.

80 U.S. at 355.

Respondent argues he was not disrespectful to Judge Greer because, if he had been, Judge Greer could not have heard his contempt prosecution due to personal bias. This is not true. Respondent was disrespectful to the presiding judge at the hearing in question; it was not directed at Judge Greer because of who he is, but rather because of the office he holds. Respondent was disrespectful and contemptuous of the institutional role of the judge. Respondent would have displayed the same unprofessional behavior to any judicial officer of the district that happened to be presiding over the case.[79] Judge Greer disposed of this contention of personal bias with the following language:

> As the Court order of March 23, 2007, (Doc. 748), makes clear, Mr. Moncier's alleged contemptuous conduct involved the direct disobedience by him of an explicit oral order of the Court. Except to the extent that any refusal to comply with a court order generally involves disrespect to the Court as an institution, Mr. Moncier's conduct in the case involved no personal attack upon the undersigned and was in no sense personal to the undersigned, with one possible exception which will be discussed below. Resistance to the authority of the Court by refusal to comply with its orders is hardly the kind of offense which involves disrespect toward or criticism of a judge such as to invoke the requirements of Rule 42(a)(3). In addition, the Court's comments of March [**115] 23,

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79 Indeed, Respondent testified to precisely this, stating he would have disobeyed the court order regardless of the identity of the judge. Tr. 127 (". . . I would have done it before any district court judge.")

> 2007, supported by the record as a whole, suggest Mr. Moncier's disrespect for the Court as an institution rather than an improper attack of a personal nature toward the undersigned, who simply happens to have the responsibility of presiding over this Court.

Moncier I, 2007 U.S. Dist. LEXIS 30241, 2007 WL 1206731 at *2.

C. Other matters

1. Respondent's argument that zealous representation excuses unprofessional conduct

The Court must also address a suggestion by Respondent and some of the attorneys who submitted declarations that somehow zealousness is a justification or excuse for professional misconduct. About two years ago, the country endured a very tragic spectacle arising in North Carolina where an attorney serving as district attorney allowed his zealousness to overcome the obligations he owed to the profession and the law. Great harm was done to individuals, the reputation of one of the country's leading institutions of higher learning, and the legal profession as a whole. The sad example of that attorney should serve as a caution that zealousness on the part of attorneys can never supercede their obligation to the profession and the law.

In fact, Respondent's notion of zealousness is a perversion of professionalism. The idea that zealousness can be an excuse for unethical and unprofessional behavior is a pernicious disease that threatens to eat away at the integrity and nobility of the court as an institution. Zealousness is commendable, but it is not and cannot ever be an acceptable excuse for

unprofessional and unethical conduct. Under Respondent's construct, attorneys are free to interrupt and talk over judges presiding over proceedings, to abandon or threaten to abandon a client if the attorney does not get his way, and to disobey a direct order [*807] of a judge when the attorney deems it appropriate. That is not how attorneys are expected nor permitted to conduct themselves in the Eastern District of Tennessee.

Moreover, the idea that there is a conflict between zealous advocacy and ethical and professional behavior is completely false. There is no conflict between zealous advocacy and professional conduct. The case law is replete with affirmations of that fundamental principle. [**117] The Court will merely cite to two. *Black and Decker Inc. v. Robert Bosch Tool Corp.*, 2006 U.S. Dist. LEXIS 84969, 2006 WL 3359349 (N.D. Ill. Nov. 20, 2006), *vacated on other grounds*, 260 Fed. Appx. 284, 2008 WL 60501 (Fed. Cir., 2008), and *Conklin v. Warrington Tp.*, 2006 U.S. Dist. LEXIS 54292, 2006 WL 2246415 (M.D. Pa. Aug. 4, 2006). In *Black and Decker*, the court said:

> An attorney's obligations to provide zealous advocacy on behalf of his client are not absolute and uncompromising, but must be viewed in light of his additional obligations as an officer of the court to promote the administration of justice and to comply with the court's rules, notices, and orders. Additionally, as with his obligations to his client, the attorney's obligations to the court are ongoing at every stage of the litigation and the attorney must continually reevaluate the positions advanced in light of both the development of the litigation itself and of the relevant case law affecting the litigation.

2006 U.S. Dist. LEXIS 84969, 2006 WL 3359349 at *2 (quoting *Allen Eng'g Corp. v. Bartell Indus.*, 299 F.3d. 1336, 1356 (Fed. Cir. 2002)).

In *Conklin*, the court made the same point:

> When an attorney is of the opinion that the court has issued an erroneous ruling, it is his or her duty as an advocate to seek reconsideration or clarification of that ruling. However, the exercise of this duty of advocacy never justifies the use of disrespectful, unprofessional or indecorous language to the court. Respect and zealous advocacy are not mutually exclusive concepts. When zealous advocacy degenerates into impertinent, scandalous, and insulting language, it is the court's duty to address squarely the offending conduct, and to tailor a sanction appropriate to the offense. *See, e.g., Commonwealth v. Rubright,* 489 Pa. 356, 414 A.2d 106, 110 (Pa.1980) ("The judge is the court, and a display of insolence and disrespect to him is an insult to the majesty of the law itself.... When carrying out the judicial function, the judge becomes a personification of justice itself. When presiding over any aspect of the judicial process, the judge is not merely another person in the courtroom, subject to affront and insult by lawyers."

2006 U.S. Dist. LEXIS 54292, 2006 WL 2246415 at *2 (footnote omitted).

2. Comparison with other disciplinary cases

Since this Court has been Chief Judge it has taken action under Local Rule 83.7 on numerous occasions.

However, in the great majority of those cases the Court was acting pursuant to Rule 83.7(f) because the Supreme Court of Tennessee or some other authority had taken action against a member of this bar, for reasons such as not paying required fees or obtaining necessary Continuing Legal Education credits, and this Court was merely taking reciprocal action.

Only in three cases did the Court contemplate issuing a Show Cause Order and in only one other case did the Court do so. In that case, the attorney had disobeyed an order of a judge of this court. The attorney had been ordered not to practice in a particular court but had continued to do so in a surreptitious manner. He had done so on multiple occasions by accepting clients, collecting fees from those clients, preparing filings, and then having another lawyer submit those filings to the court. When the attorney's disobedience became known, the matter was reported to this Court and a Show Cause Order was issued. Respondent demanded a hearing but failed to appear for the hearing. The Court suspended the attorney from the bar of this court for five years, but permitted him to petition the court for early readmission after two years based upon him satisfying certain conditions.

This earlier case is not similar to Respondent's case in all respects - that misconduct did not take place in front of the court, did not involve interruptions of the court, did not involve abandonment of a client, and did not involve any disrespect or contempt for the institutional role of the judge. In that light, this previous case is not as aggravated as Respondent's case. However, even though dissimilar, it does provide some gauge for Respondent's disposition.

VII. DISPOSITION OF UNPROFESSIONAL CONDUCT

A. Mitigating factors

1. It is a positive comment on Respondent that over twenty of his colleagues and co-workers vouch for his character. They greatly admire his legal work and advocacy for clients and the mentoring, training, and support he provides to fellow criminal defense attorneys.

2. Respondent's misconduct cited in the Show Cause Order took place in just one proceeding.

3. Respondent has expressed remorse regarding how his conduct was perceived and states he has attempted to learn to communicate better.

4. Respondent has appeared in several court proceedings without incident since the November 2006 misconduct.

B. Aggravating factors

The Court will now consider those matters that are aggravating and that distinguish Respondent's case from previous disciplinary actions.

1. Respondent was reprimanded by Judge Jordan in 2005, according to Respondent's testimony before Magistrate Judge Lee, for disrespect to judges of this court. According to Respondent, Judge Jordan warned him to not engage in such conduct again and, if Judge Jordan heard that he had, Judge Jordan would hold him in contempt. It is rare for a judge to issue such a reprimand to a lawyer and for an attorney to receive one. Most attorneys would have made sure they rectified the deficiencies that concerned the judge. This should have alerted Respondent that his conduct was viewed as unethical and unprofessional conduct. This was a clear warning to Respondent. Responded failed to heed this warning.

2. Respondent had been warned repeatedly by Judge Greer prior to November 2006 that his actions were

unethical, unprofessional, and unacceptable. Judge Greer had also threatened to hold Respondent in contempt. As Judge Greer described it:

> Taking the monumental step of accusing an attorney of criminal contempt is an act of last resort and, in this Court's view, should be used only after all other efforts have been exhausted to assure the offending lawyer's compliance with the applicable rules of professionalism and civility. Those efforts had already been exhausted with Moncier. Throughout the course of Moncier's appearances before this Court, this Court has admonished Moncier for a wide range of misconduct, has lectured him concerning the Court's expectations as to professionalism and civility and has threatened him with a finding of contempt [*809] on prior occasions, all to no avail. This case, ultimately speaking, presents a very simple issue of whether the presiding judicial official will control the course of the proceedings in the courtroom or whether contumacious lawyers will be permitted to take control.

Moncier II, 2007 U.S. Dist. LEXIS 39206, 2007 WL 1577718 at *4.

Yet in the face of these warnings, admonishments, lectures, and threats, Respondent continued in and escalated his unprofessional behavior in the November 2006 hearing. Most attorneys would be mortified at such admonitions from a judge and would strive to raise their practice and behavior to a higher level of professionalism so that their conduct would be beyond criticism. Respondent failed to heed the warnings Judge Greer gave.

3. Respondent has not demonstrated any remorse for his misconduct and unprofessional behavior and fails to recognize his conduct was improper. This compels the Court to conclude Respondent will repeat the offensive behavior before judges of this court in the future.

4. Respondent has failed to come to grips with his obligation as a lawyer admitted to the bar of this court to obey orders of this court, whether he agrees with them or not and whether he intends disrespect or not. Attorneys simply are not permitted to decide on their own when and whether to obey an order of a judge of this court. If, as the Respondent seems to suggest, the judges allowed any attorney before them who disagreed with a court order to disobey it, society would lose the rule of law in resolving disputes. Our legal system would be relegated to little more than the law of the jungle, conceding victory to the party with the attorney who could bellow the loudest and intimidate the most. This Court appreciates Respondent's desire to provide zealous advocacy to his clients, but Respondent does not seem to appreciate he is not special in this regard. This Court is constantly presented with defense attorneys who zealously represent their clients - but they also do so in an ethical, professional manner and with civility and respect to the Court and to opposing counsel.

5. Respondent disobeyed this Court in failing to file a response as ordered.

6. Respondent disobeyed this Court in failing to notify other judicial officers as ordered.

7. Respondent filed frivolous motions contesting the authority of the Court to discipline him.

8. Respondent filed a frivolous motion seeking to have the Court reverse its order requiring him to inform other judicial officers.

9. Respondent asserted being "goaded" by opposing counsel is an excuse or justification for his unethical and

unprofessional conduct. Respondent claimed he was entrapped by the opposing Assistant U.S. Attorney into the misconduct, but ultimately then refused to acknowledge it was misconduct.

10. Respondent filed a number of motions and other submissions that demonstrated arrogance, a dismissive attitude toward the Court, and an indifference to the unnecessary burden those submissions placed on the Court.

11. Respondent filed a number of frivolous motions and other submissions that were devoid of legal or factual support and that were submitted for improper reasons.

12. Respondent failed to acknowledge that it is unethical and unprofessional conduct for an attorney to interrupt and talk over a judge.

13. Respondent failed to acknowledge that it is unethical and unprofessional conduct for an attorney to threaten to abandon a client.

[*810] 14. Respondent failed to acknowledge that it is unethical and unprofessional conduct for an attorney to disobey a direct order from a judge.

15. Respondent dismisses efforts at constructive criticism designed to have him raise his conduct to a level meeting the minimum standards of ethical and professional conduct as expressions of "dislike" about the way he practices law. Before Judge Greer, Respondent made this claim. Judge Greer corrected him in the following language:

> What I have said to you on numerous occasions is that I do not like the lack of civility that you bring to cases; that I do not like the lack of candor that you often bring to cases; that I do not like the fact that you on occasion misrepresent facts before a jury or

> before a witness; that I don't like the aspersions you cast, the personal aspersions that you cast at times upon the professionals who oppose you, nor do I like the aspersions you cast upon the Court at times...I do not like the fact that you'll make an argument before the jury that I sustained an objection to or, or instructed you not to make....

Vassar Tr. 90.

16. Respondent submitted a number of declarations or character references by lawyers wherein those lawyers indicate Respondent engaged in ethical and appropriate professional behavior in the proceeding before Judge Greer. In some of the declarations, the attorneys even state Respondent's behavior is commendable. These statements from supporters, if they are to be believed, indicate that the signers believe that it is appropriate and professional conduct for an attorney who is a member of the bar of this court to interrupt and talk over a judge, make scurrilous personal attacks on opposing counsel, threaten to abandon a client in the midst of a court proceeding, and disobey an order of the court. By submitting them, one can only assume that is also Respondent's belief. That is a disturbing sentiment.

17. Respondent submitted a declaration from Bethany Dumas that flies in the face of and directly contradicts the undisputed facts in this case. Respondent cannot have seriously expected the Court to give this submission any credence. If Respondent desired the Court to accept this submission as true, then this could only be an effort to perpetrate a fraud on the Court.

18. Finally, in this Court's thirteen years on the federal bench, it knows of no situation where a lawyer in this district has exhibited such unethical and

unprofessional conduct as Respondent did in the November 2006 hearing.

C. Guiding considerations

The Court in deciding the appropriate disciplinary action in this case will be guided by the need to protect the public; the need to protect the integrity and standards of the court and the bar of the Eastern District of Tennessee; the need to correct the unethical and unprofessional behavior of Respondent; and the need to deter other members of the bar of this court from similar unethical and unprofessional conduct. The Court will also consider how the disciplinary action compares to the Court's previous disciplinary case.

In weighing the aggravating and mitigating factors, the Court concludes that disbarment is not appropriate for Respondent's misconduct. However, the Court does conclude that discipline is necessary, and that such discipline be designed to impress upon Respondent the absolute requirement he live up to the standards and expectations of the bar of this court; to provide him an opportunity to demonstrate understanding of his unethical and unprofessional conduct; to provide him an opportunity [*811] to make amends for this misbehavior; and to allow him to return to this bar under supervision to protect the public and the integrity of the bar of this court. Considering all of the factors, the Court concludes that a suspension of five years with two years probation, and with the possibility of early reinstatement with probation, is necessary and appropriate to fulfill the purposes detailed above.

VIII. CONCLUSION

This Court, along with the other judges of this bench, has often said the bar of the Eastern District of Tennessee is outstanding, civil, professional, and competent. That opinion means the judges think that

the overwhelming majority of attorneys admitted to this bar habitually conduct themselves with dignity, civility, and professionalism, and always strive to adhere to the highest of ethical standards. Rarely are we disappointed.

Respondent's deviation from these standards makes manifest the necessity to take clear action to demonstrate his conduct is fundamentally unacceptable for members of this bar. If even a small percentage of the attorneys that practice in the Eastern District of Tennessee engaged in interrupting and talking over the presiding judge, attempting to bully and intimidate the presiding judge by threatening to abandon clients in the midst of a court proceeding, making scurrilous personal attacks on opposing counsel, and disobeying direct orders of the court, then the civility and order in the courts would quickly dissolve. The public would be left with a federal court system dominated by force and intimidation tactics, rather than the rule of law.

Respondent's misconduct is unprecedented in this district. Facing disciplinary action from this Court, Respondent bombards the Court with frivolous motions and filings in this case, disobeys the orders of this Court, submits recklessly false declarations, and places an unnecessary burden on the Court's time and resources. Respondent still shows no appreciation that his misconduct cannot be tolerated in a court of law.

The need for disciplinary action here is amply demonstrated by Respondent's statement at the hearing before Magistrate Judge Lee. He said, "I must question why it is that I'm on trial here in Chattanooga when I have done everything that the law provides that I am permitted to do." This statement speaks volumes about Respondent's failure to understand and have insight into his own actions. Respondent's lack of appreciation for his unethical and unprofessional behavior and the danger of recurrence this presents clearly establishes

the need for disciplinary action. *In re Peters*, -- F.Supp.2d --, 2008 U.S. Dist. LEXIS 29454, 2008 WL 1000131 at *3 ("Considering the nature and seriousness of the charges against [attorney], the strength of the record supporting those charges, and the danger of recurrence as demonstrated by respondent's lack of appreciation of the wrongfulness of her misconduct, the Committee concludes that an interim suspension of respondent from the practice of law before this Court pending final adjudication of the charges against her is warranted."). Respondent apparently does not understand why the court is concerned with his behavior even after Judge Jordan in 2005 warned him about his disrespect to judges in this district and threatened to hold him in contempt; even after Judge Greer counseled and warned him prior to November 2006; even after Judge Greer had him arrested for his conduct in the November 17, 2006 hearing; even after his conviction for contempt of court before Judge Greer; and even after receipt of the Show Cause Order. Respondent has apparently dismissed all of these very strong warnings that he must meet the standards expected of attorneys that are members of [*812] the bar of this court. As Judge Greer stated regarding the necessity of action:

> While it would have been far easier and less time consuming for this Court to ignore Moncier's contemptuous conduct, to do so would be to encourage disobedience to lawful court orders. The ability of this Court-indeed, all courts-to compel obedience to its orders is fundamental to its proper function. For the Court to turn its head to Moncier's conduct would likewise further erode the respect of the public for the bar, the vast majority of whom take seriously "the processes of an orderly trial, which are the supreme object of the lawyer's calling." *Sacher v. United States*,

> 343 U.S. 1, 72 S. Ct. 451, 96 L. Ed. 717 (1952). The vast majority of lawyers vigorously represent their clients and understand that zealous representation of a criminal defendant does not include deliberate defiance of a judge's [**132] direct and explicit orders. Moncier's deliberate and continued interruption and argument with the rulings of the court and his unprofessional and contumacious conduct must cease; otherwise, the Court surrenders control and independence of the proceedings to lawyers who "equate contempt with courage." *Id.* This Court is unwilling to do so.

Moncier II, 2007 U.S. Dist. LEXIS 39206, 2007 WL 1577718 at *10.

The Court detects in Respondent's behavior, both before Judge Greer and in this case, an undercurrent of disrespect and a subtle contempt for the institutional role and position of the trial judge in litigation. Judge Greer commented on this in his order and the Court has mentioned it above. Respect for the position of the presiding judge is necessary for the administration of justice. *See* American College of Trial Lawyers Code of Trial Conduct P 17(b) ("During the trial, a lawyer should always display a courteous, dignified and respectful attitude toward the presiding judge, not for the sake of the judge's person, but for the maintenance of respect for and confidence in the judicial office.") and P 17(d) ("In performing these duties, a lawyer should conduct himself or herself according to law and the standards of [**133] professional conduct as defined in codes, rules and canons of the legal profession and in such a way as to avoid disorder or disruption in the courtroom.").

Consequently, having been provided with notice of the allegations and a chance to be heard; having submitted his response; having been afforded a hearing to respond to the factual allegations and present his own proof, the Court finds Respondent has engaged in unethical conduct and violated the Tennessee Rules of Professional Conduct. For this reason, the Court deems it in the public interest to suspend Respondent from the practice of law in this district. His conduct has fallen below that required of members of the bar of the Eastern District of Tennessee, and has called into question his fitness to continue as a member of the bar of the Eastern District of Tennessee. Permitting an attorney who refuses to accept the ethical and professional obligations of members of the bar of this court to continue as a member of this bar poses an immediate danger to the public, the bar, and this court. The Court therefore will accept and adopt Magistrate Judge Lee's Recommendation with respect to the necessity for disciplinary action.

Accordingly, the Court **ACCEPTS** and **ADOPTS** Magistrate Judge Lee's Recommendation and **ORDERS:**

(1) Respondent is **REPRIMANDED** for his remarks concerning opposing counsel;

(2) Respondent is **SUSPENDED** from the practice of law in the United States District Court for the Eastern District of Tennessee (all divisions and all units, including the Bankruptcy Court) for a period of seven years with a maximum of five of [*813] those years being active suspension, and the remaining years being on a probationary status, commencing on the date of the entry of this order;

(3) At the expiration of three years of the suspension, and at each one-year anniversary thereafter, up until five years, Respondent shall be allowed to apply to the

Chief Judge for an **EARLY REINSTATEMENT**, which application must contain the following:

(a) Evidence by clear and convincing proof that Respondent has taken significant and meaningful steps to bring his practice and behavior in court up to the standards of ethics, civility, professionalism, and respect for the institutional role of the court that complies with the expectations and standards of members of the bar of the Eastern District of Tennessee;

(b) Copies of letters of apology addressed to all judicial officers of this district (district, bankruptcy, and magistrate) wherein Respondent admits his wrongful, unethical, and unprofessional conduct, makes an apology for the conduct, and makes a commitment he will not engage in such wrongful, unethical, and unprofessional conduct in the future. The sincerity of Respondent as expressed in these letters will have a bearing on whether the court determines Respondent has attained the fitness necessary for him to be reinstated;

(c) A certification that he has not been accused of any other unethical or unprofessional conduct of any type and by any attorney, client, body, board, judge, or entity since the date of this order; if the first application for reinstatement is denied, then in any later application this certification shall be limited to the preceding three year period;

(d) A certification that no official body or judge or court has taken action of any type against him for any unethical or unprofessional conduct of any type since the

date of this order; if the first application for reinstatement is denied, then in any later application this certification shall be limited to the preceding three year period;

(e) A commitment to the Chief Judge that he understands, appreciates, and accepts the necessity of civility and professionalism in the practice of law by all attorneys admitted to practice in this district and that he has adopted these required principles into his practice and will conduct himself at all times with civility and professionalism; and

(f) Copies of letters addressed to all signers of the declarations submitted in reference to this disciplinary action informing them that his conduct before Judge Greer was wrongful, unethical, and unprofessional, and that it is never acceptable for a member of the bar of the Eastern District of Tennessee to interrupt or talk over a judge of this bench, to threaten to abandon a client in the course of a proceeding, to make scurrilous personal attacks on opposing counsel, or to disobey an order of a judge even if the attorney believes the order is wrong. The sincerity of Respondent as expressed in these letters will having a bearing on whether the court determines Respondent has attained the fitness necessary for him to be reinstated.

(4) The Chief Judge will consider any petition for early reinstatement submitted after the expiration of three years by Respondent but will exercise its sound discretion in deciding whether or not to allow [*814] Respondent's application to be readmitted to the bar of this court to be considered prior to the expiration of five years;

(5) Should the Chief Judge decide to allow Respondent's application to be readmitted to the bar of this court to be considered prior to the expiration of five years, and the decision is made to readmit him, the Respondent shall be placed in a **PROBATIONARY STATUS** for the remaining years of his seven years of suspension. The terms and conditions of his probationary status shall be decided at such time as Respondent applies for readmission. If Respondent does not agree to these terms and conditions, Respondent's suspension shall continue until such agreement is reached but no longer than the remaining years of the seven-year suspension;

(6) At the expiration of five years, Respondent may apply for admission to the bar of this court and, if his application is accepted, he shall be placed in a probationary status for two years. The terms and conditions of his probationary status shall be decided at such time as Respondent applies for readmission. If Respondent does not agree to these terms and conditions, Respondent's suspension shall continue until such agreement is reached but no longer than two years;

(7) At the expiration of seven years, assuming Respondent has successfully completed his probationary period, Respondent may apply for admission to the bar of this court on the same basis as any other applicant.

SO ORDERED.

ENTER: 4/29/08

/s/

CURTIS L. COLLIER

CHIEF UNITED STATES DISTRICT JUDGE